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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 405

MARVIN GAYES, PETITIONER,

vs.

THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED AUGUST 16, 1946.

CERTIORARI GRANTED DECEMBER 16, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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MARVIN GAYES, PETITIONER,

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[fol. 1]

IN SUPREME COURT OF NEW YORK, COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

vs.

FRANCIS SMITH and MARVIN H. GAYES

INDICTMENT—Filed July 13, 1938

The Grand Jury of the County of Monroe, by this indictment, accuse the defendants, Francis Smith and Marvin H. Gayes, of the crime of Burglary in the Third Degree, committed as follows:

The defendants, on or about June 11, 1938, at the Town of Rush, Monroe County, New York, feloniously broke and entered the building and garage of Francis Marlow, doing business under the name and style of Pontiac Garage, with intent to commit therein the crime of larceny.

Second Count:

And the Grand Jury of the County of Monroe, by this indictment, further accuse the defendants, Francis Smith and Marvin H. Gayes, of the crime of Petit Larceny, committed as follows:

The defendants, at the same time and place as set forth in the first count of this indictment, stole and took from the possession of Francis Marlow, the following property owned by him, to wit, cigarettes of the value of Seventy-five cents ($.75), two flashlights of the value of One Dollar ($1.00) and Three Dollars ($3.00), lawful money of the United States, with intent to deprive the owner thereof and of the use and benefit thereof, and to appropriate the same to the use of the defendants.

D. J. O'Mara, District Attorney of Monroe County.

[fol. 2] [Endorsed:] No. 22. Supreme Court, Monroe County. The People vs. Francis Smith and Marvin H. Gayes. Indictment. Burglary 3rd Degree and Petit Lar-

ceny. Daniel J. O'Mara, District Attorney. A true bill. Fred K. Thompson, Foreman. Filed Jul. 13, 1938. Sent to the County Court.

[File endorsement omitted.]

[fol. 3] IN MONROE COUNTY COURT

Present, Hon. Wm. C. Kohlmetz, County Judge, Monroe County.

Indictment No. 22

THE PEOPLE

vs.

FRANCIS SMITH, MARVIN H. GAYES

RECORD OF CONVICTION—Filed July 13, 1938

The Defendants having been indicted for the crime of Burglary 3rd Degree and Petit Larceny on the 13 day of July, 1938, committed as follows: On or about June 11, 1938, at the Town of Rush, Monroe County, New York, feloniously broke and entered the building and garage of Francis Marlow, doing business under the name and style of Pontiac Garage, with intent to commit therein the crime of larceny.

The defendants having been brought into Court for arraignment on the 15 day of July, 1938, each was asked if he desired the aid of counsel, to which each answered, "No." and the said defendants were thereupon arraigned upon the indictment, to which each pleads that he is Guilty, Burg. 3rd and Pet. Lare. On the — day of — 19—, defendant changed plea to guilty, whereupon the Court appoints the — day of — 19—, for trial. Defendant was thereupon tried and on —— —, 19—, was convicted of ——, whereupon the Court appoints the 28 day of July, 1938, for pronouncing judgment.

And on said last mentioned day the defendants appeared for judgment and each was asked by the Clerk whether he had any legal cause to show why judgment should not be pronounced against him; and no sufficient cause appearing

why judgment should not be pronounced. Sentence Suspended on Defendant Francis Smith. Probation 5 years.

It is Ordered and Adjudged by the Court that the said Marvin H. Gayes for the crime of Burglary 3rd Degree and Petit Larceny, aforesaid, whereof he has been convicted, be imprisoned in the New York State Vocational Institute at West Coxsackie, New York, to be there confined under the provisions of law relating to that institution, for the term of ——, he being sentenced this 28 day of July, 1938.

The above named defendant- was examined by the Court before judgment was pronounced and he stated that he was Marvin H. Gayes, born at Savannah, Ga.; resides at S. P. C. C. at Rush, N. Y.; age 16 years; single; parents ——; occupation, student; education, 2 yr. High; Had religious instruction; habits, temperate; once before convicted. Francis Smith, born at Rochester, N. Y.; resides at Rush, N. Y., age 17 years, single; mother living; occupation, farmer; education, 8th grade; had religious instruction; habits, temperate; never before convicted.

Ordered, That the Sheriff of the County of Monroe take a prisoner now confined in the Monroe County Jail, and forthwith deliver him to the custody of the authorities in charge of the State Prison at Auburn, N. Y., in accordance with the judgment of this Court pronounced upon the — day of ——, 19—.

(Here follows 1 Photolithograph, side folio 4)

STATEMENT OF DEFENDANT

Monroe County Court.

On this 14 day of July 1938, the convicted defendant having been duly sworn, answered the questions below as follows:

What is your name? Marvin K. Hayes

Where were you born? Savannah Georgia

Ever been naturalized? When and where?

Where do you reside? A.P.C.C. at Rush, N.Y.

What is your age? 16 years. When? Sept 18, 1937

Are you married? single Wife living?

Have you children living?

Is your father living? Don't no Native of Don't Know

Is your mother living? Don't no Native of Canada (Dunc

What is your occupation? student

What education have you received? 2 yr Hig

Have you had religious instruction? Had

Are you temperate in habits? Temperate

Ever before convicted? Yes How many times? Once

Date	Place	Offense	Court	Disposition
Jan 14 1938	Toronto	Burg 3rd	Toronto Canada	6 months & deported

Judge Wm C. Kahlmeyer

Statement taken by

Attorney Waived

Crime Burg 3rd & Pet Larc

No. of indictment 922 July 13 1938

Plea guilty (Plea ~~Not~~)

Date of arraignment July 14, 1938

Date of sentence July 25, 1938

Sentence

July 25-38 Contracted -

[fol. 5] IN COUNTY COURT—COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

v.

MARVIN H. GAYES, Defendant

MINUTES OF ARRAIGNMENT AND SENTENCE

Proceedings had before Hon. William C. Kohlmetz, Monroe County Judge, at the Court House, Rochester, N. Y., at ten o'clock in the forenoon, July 14, 1938.

Present: For the People: Clarence J. Henry, Assistant District Attorney. The defendant appeared in person, without counsel.

By Mr. Henry:

Q. You spell your last name G-a-y-e-s?

By Marvin H. Gayes:

A. Yes.

Q. Do you have a lawyer?

A. No, sir.

Q. By indictment No. 22, filed July 13, 1938, you are accused of the crime of burglary third degree committed as follows: in that on or about June 11, 1938 at the town of Rush, Monroe County, New York, you feloniously broke and entered the building and garage of Francis Marlow, doing business under the name and style of Pontiac Garage, with intent to commit therein the crime of larceny; and by [fol. 6] a second count you are further accused of the crime of petit larceny in that at the same time and place as set forth in the first count of the indictment you stole and took from the possession of Francis Marlow cigarettes of the value of $.75, two flashlights of the value of $1.00, and $3.00 in currency. Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment?

A. No, sir.

Q. What is your plea?

A. Guilty.

Q. You have not received any promises from the district attorney or any member of his staff as to what disposition will be made of your matter?

A. No, sir.

The Court: Adjourned to July 25th for sentence.

July 25, 1938—10 a. m. Same appearances as noted

The Court: This matter is adjourned to July 28th at ten o'clock.

July 28, 1938—10 a. m. Same appearances as noted.

Mr. Henry: The People move this matter for sentence.

The Clerk: Have you any legal cause to show why the judgment of the Court should not now be imposed upon you?

The Court: Have you anything to say?

Marvin H. Gayes: No, sir.

The Court: It is the sentence of the Court that you be [fols. 7-8] committed to the New York State Vocational School at West Coxsackie, New York, and dealt with there according to law.

Stenographer's Certificate

I, Herbert J. Erb, do certify that I am now, and was at the time of the above and foregoing proceedings, one of the official court stenographers of Monroe County Court; that the above and foregoing is a true and correct transcript, and the whole thereof, of the proceedings had in the matter of The People of the State of New York vs. Marvin H. Gayes, defendant, before Hon. William C. Kohlmetz, Monroe County Judge, on the dates indicated.

Herbert J. Erb.

Rochester, N. Y., December 21, 1946.

[fols. 9-10] *When Replying Sign Your Full Name and Address. Give Inmate's Full Name and Number.*

Name: Walter H. Wickins, County Clerk.
Street & No.: County Court House.
City, Rochester; State, N. Y.

Box B, Dannemora, N. Y.,
Date Feb. 29, 1946.

Please certify this Writ of Coram Nobis and return it to me.

Thank you.

Marvin Gayes, #27432.

3/221/2750.

No papers like this on file to certify from.

[fols. 11-12] August 2, 1946.

Mr. Marvin P. Gayes,
Box B—#27432,
Dannemora, New York.

Dear Sir:

The enclosed papers were received at the County Clerk's Office with a request that we have them certified.

We are unable to find any papers like this on file in our office from which to certify the enclosed papers.

Very truly yours, —— ——, County Clerk.
County Clerk.

WHW:mb

[fols. 13-14] May 16th, 1946.

Mr. Marvin P. Gayes, #27432,
Box B,
Dannemora, New York.

Dear Sir:

Your moving papers on your motion to vacate sentence and judgment of conviction have been received.

The motion has been placed on the Regular Special Term of this Court for June 3rd, 1946 at 10 A.M. at which time you may appear by counsel and in the absence of counsel, your motion will be considered on the moving papers.

Sincerely yours, —— ——.

JPOC:MMM

[fols. 15-16] May 31st, 1946.

Mr. Marvin P. Gayes, #27432,
Box B,
Dannemora, New York.

Dear Sir:

Your communication of May 19th, 1946 at hand.

I believe my letter of May 16th, 1946 fully advises you as to the status of your motion which has been placed on the Regular Special Term calendar for June 3rd, 1946 at 10 A.M., as you were previously advised.

Sincerely yours, —— ——.

JPOC:MMM

[fol. 17] Name: Clerk of Monroe County,
Street & No.; County Court House,
City: Rochester #4. State: New York.
Date: May 19th, 1946.

Office of County Clerk,
County Court House,
Rochester, New York.

In Re: People v. Marvin Gayes. For Writ of Coram Nobis.
Return Date: June 3rd.

Dear Sir:

Enclosed you will find two (2) letters that I request be filed with your office, of above entitled action.

Very respectfully yours, Marvin Gayes, Box B, 27432, Dannemora, New York.

[fol. 18] Name: Hon. James P. O'Connor.
Street & No.: County Court Chambers.
City: Rochester #4. State: N. Y.
Date: May 19, 1946.

In Re: People v. Marvin Gayes. Coram Nobis return date June 3, 1946.

Honorable Sir:

This letter is an acknowledgment of yours of May 16, 1946, and in regards to the proceedings I have instituted, and which Your Honor has written in part "at which time you may appear by counsel and in absence of counsel, your motion will be considered on the moving papers." This will not afford this writer and Litigant proper relief and will render the motion to trial court to a zero value and will prove them to be unavailable and in practice seriously inadequate.

The petitioner asks the Court now for relief or an alternative relief, as follows:

(1) That this petitioner who is now being detained at Clinton Prison, has no funds available in order to procure counsel, nor any one reasonably interested, or relatives who may come to his aid, and not appearing without an order from Your Honor is seriously handicapped. And petitioner in order to protect his interests asks for the relief following:

[fol. 19] (a) That he be given on request copies of District Attorney's Affidavits and whatever papers to

be used in Opposition, so that petitioner may traverse the return and make the proper denial of allegations not conceded by District Attorney of said County,

(b) that Your Honor on the moving date June 3, 1946 hold the motion in abeyance until this petitioner can traverse the return and file his denial of such that he may think proper. And that Your Honor protect this petitioner's rights fully by Asking the District Attorney if he has served the petitioner with the opposing papers.

(2) That petitioner be given Court assigned counsel to argue the petition and that petitioner be given a copy of the transcript of such hearing, because of the following:

(a) In the State of New York a motion or Coram Nobis writs are not appealable because of their nature of being an intermediate order. (See People v. Gersewitz, Court of Appeals, decided April 12, 1945

[fols. 20-21] (b) That in light of the above it will be seen by Your Honor that the New York State practice will be proved inadequate and unavailable to this petitioner and he will then have to proceed directly to the Supreme Court of United States on Certiorari to review the proceedings in such State Court that the action arose from. (See People v. Canizo decided by United States Court of Appeals, Washington, D. C., on April of 1946, And this court has already decided the petitioner's points of Law that no one of the age of 17 years could competently and intel-igently waive any Constitutional Right.

The Petitioner therefore asks respectfully that some relief be granted and that this letter be made part of the moving papers and is filing a copy with the Clerk of County Court of Monroe County, Rochester, N. Y.

Very respectfully yours, Marvin Gayes, Box B 27432, Dannemora, N. Y.

[fols. 22-23] Date: May 19, 1946.
Name: Hon. District Attorney.
Street & No.: County Court House.
City: Rochester. State: N. Y.

In Re: People v. Marvin Gayes. Coram Nobis return dated June 3, 1946.

Dear Sir:

I have served you with a copy of the proceedings in nature of Coram Nobis and respectfully request the same to be served upon this petitioner at least 8 days before the return date June 3, 1946.

Notice:

To: Honorable James P. O'Connor that I have requested that the District Attorney furnish the petitioner with Affidavits in Opposition.

Notice:

To: Clerk of Monroe County Court, City of Rochester, N. Y., to file copy of this request to be filed as part of moving papers.

Very Respectfully Yours, Marvin Gayes, Box B, 27432, Dannemora, N. Y.

[fol. 24] Date: May 19, 1946.

Name: Hon. James P. O'Connor.
Street & No.: County Court Chambers.
City: Rochester #4. State: New York.

In Re: People v. Marvin Gayes. Coram Nobis return date June 3, 1946.

Honorable Sir:

This letter is an acknowledgment to yours of May 16, 1946, and in regards to the proceedings I have instituted, and which your Honor has written in part: "at which time you may appear by counsel, and in absence of counsel, your motion will be considered on the moving papers." This will not afford this writer and Litigant proper relief and

will render the motion to trial court, to zero value and will prove then to be unavailable and in practice seriously inadequate.

The petitioner asks the Court now for relief or an alternative relief, as follows:

(1) That the petitioner who is now being detained at Clinton Prison, has no funds available in order to procure counsel, nor anyone reasonably interested, or relatives who may come to his aid, and not appearing without an order from your Honor, is seriously handicapped. And petitioner in order to protect his interest asks for the relief following:

[fol. 25] (a) That he be given upon the request copies of District Attorney's Affidavit and whatever papers to be used in opposition, so that petitioner may traverse the return and make the proper denial of allegations not conceded by District Attorney of said county.

(b) That Your Honor on the moving date June 3, 1946, hold the motion in abeyance until the petitioner can traverse the return and file his denial of such that he may think proper. And that Your Honor protect this petitioner's rights fully by asking the District Attorney if he served the petitioner with the opposing papers.

(2) That petitioner be given Court assigned counsel to to argue the petition and that petitioner be given a copy of the transcript of such hearing, because of the following:

(a) In the State of New York a Motion or Coram Nobis writs are not appealable because of their nature of being an intermediate order.

(See People v. Gersewitz, Court of Appeals, decided April 12, 1945.)

[fol. 26] (b) That in light of the above, it will be seen by your Honor that the New York State practice will be proved inadequate and unavailable to this petitioner and he will then have to proceed directly to the Supreme Court of United States on Certiorari to review the proceedings in such State Court that the action arose from. (See People v. Canizo, decided by United States Court of Appeals, Washington, D. C., on April of 1946. And this same Supreme Court has

already decided the petitioner's points of law in 1941, that no one of the age of 17 could competently and intelligently waive any Constitutional Right.

The petitioner therefor- asks respectfully that some relief be granted and that this letter be made part of the moving papers and is fileing a copy with the Clerk of County Court of Monroe County, Rochester, N. Y.

Very Respectfully Yours, Marvin Gayes, Box B 27432, Dannemora, N. Y.

[fols. 27-28] Date: May 19, 1946.

Name: Hon. District Attorney.
Street & No.: County Court House.
City: Rochester. State: N. Y.

In Re: People v. Marvin Gayes. Coram Nobis return date June 3, 1946.

Dear Sir:

I have served you with a copy of the proceedings, in nature of Coram Nobis, and respectfully request the same to be served upon the petitioner at least 8 days before the return day and date of June 3rd, 1946.

Notice:

To: Honorable James P. O'Connor that I have requested that the District Attorney furnish the petitioner with Affidavits in Opposition.

Notice:

To: Clerk of Monroe County Court, City of Rochester, N. Y., to file copy of this request to be filed as part of moving papers.

Very Respectfully Yours, Marvin Gayes, Box B 27432, Dannemora, N. Y.

[fol. 29] Date: May 13th, 1946.

Name: County Clerk of Monroe County.
Street & No.: Monroe County Court House.
City: Rochester. State: New York.

DEAR SIR:

Enclosed you will find a Writ of Coram Nobis. Please present same to the Monroe County Court on the 3rd of June, 1946.

Sincerely yours, Marvin Peter Gayes, #27432.

[fol. 30] STATE OF NEW YORK, COUNTY COURT, COUNTY OF MONROE

PEOPLE OF THE STATE OF NEW YORK, Respondents,

against

MARVIN H. GAYES, Petitioner

APPLICATION FOR WRIT OF CORAM NOBIS—Filed May 16, 1946

For Writ of Coram Nobis, to set aside and vacate sentence and judgment of Conviction impose.

To the Honorable County Court of Monroe County, N. Y. and the District Attorney for Monroe County, N. Y.:

SIRS:

Please take notice that Marvin H. Gayes the petitioner herein will move in the County Court of Monroe County City of Rochester, N. Y., on the 3rd day of June 1946, at 10:30 o'clock in the forenoon of that day and date upon the verified petition and against all proceeding previously had concerning the petitioner and against the indictment pleading and sentence.

That he will contest the validity of sentence of conviction rendered therein on the grounds of a deprivation of Constitutional Right to Assistance of Counsel. That he moves Pursuant to the Laws and Statutes set forth in McKinney's Consolidated Laws of New York State, namely sec. 8, sub. 2; 188 and 308 of the Code of Criminal Procedure and under sec. 12 of the Civil Rights Law of New York State, and under

the New York State Constitution, Art. 1, Sec. 6 and under the 14th Amendment of the Constitution of the United States.

[fol. 31] Respectfully submitted, Marvin Peter Gayes, Petitioner in pro se, Box B # 27432, Dannemora, N. Y.

Notice to Hon. District Attorney, Monroe County, Rochester, N. Y.

[fol. 32] STATE OF NEW YORK, COUNTY COURT, COUNTY OF MONROE

PEOPLE OF THE STATE OF NEW YORK, Respondents,

against

MARVIN H. GAYES, Petitioner

PETITION FOR WRIT OF CORAM NOBIS—Filed May 16, 1946

STATE OF NEW YORK,
County of Clinton,
Town of Dannemora, ss:

Marvin Gayes being duly sworn deposes and says: That he is the petitioner in the above entitled action and that he makes the application on his own behalf, and in support of his application he sets forth the following:

1. That he is being imprisoned in Clinton Prison at the Town of Dannemora, N. Y., and in the custody of J. Vernal Jackson, Warden of said prison, under a sentence of conviction entered on the 15th day of October 1941, to a term of (10 to 20) years for the crime of Burg. 3rd degree.

2. That the sentence of the Monroe County Court that he be confined in the New York State Vocational Institution at West Cosackie, New York, and under the provisions of law relating to that institution, has expired through the action of the Parole Board on the — day of — 1944, discharging the petitioner of further servitude of that sentence. Exhibit "A".

3. That the petitioner was sentenced to that Institution, [fol. 33] The New York State Vocational Institution after

arrest for a crime of Burglary 3rd degree commit-ed on July 11th 1938, the petitioner was indicted on July 13th 1938, arraigned and plead guilty on July 15th 1938, and thereupon sentenced on July 28th 1938, as aforesaid. (See Exhibit "B".)

4. That the petitioner has been attacked by a void judgment of conviction of (10 to 20) years impose- on 15th day of October 1941, by sentence of County Court of Schnectady, N. Y. (See Exhibit "C".)

5. That the subsequent sentence is now in force and effect against this petitioner, this term of 10 to 20 years is illegal and void, because of the void character of the judgment of conviction impose- by the Monroe County Court (See Exhibit "B"), that the sentence was imposed and rendered in violation of petitioner's Constitutional Rights.

6. That the illegality complained of is as follows:

(a) That on June 11th 1938, a crime of Burglary 3rd degree was commit-ed, and the subsequent arrest on June 11th, 1938.

(b) That on July 13th 1938, petitioner was indicted by action of the Grand Jury of Monroe County, for crime of Burglary 3rd degree.

(c) That on July 15th 1938, — arraigned on the indictment, and was not informed of his Constitutional Rights of Assistance of Counsel.

[fol. 34] (d) The Record of Conviction hereinafter annexed shows that the County Court claims:

each was asked if he desired the aid of Counsel? to which each answered "No."

(e) The record is silent as to w-ether the petitioner was informed by the Court that he was entitled to the assistance of Counsel, or that he was informed of the statutory provision set forth in the Code of Criminal Procedure, N. Y. S. Sections sub. 2; 188 and 308 and that his rights are protected under Article 1 sec. 6 N. Y. S. Constitution.

7. That the only claim that Respondents can claim at this date is that the familiar phrase of—Presumption of

Regularity must be understood and that the Court did its duty.

But the question of—Presumption of Regularity is not to be attacked or contested.

But rather the question of—Whether the petitioner Intel-igently and Competently Waived his rights or Intel-igently and Competently understood his rights to assistance of Counsel.

8. That the petitioner who was (16 years of age) at the time of sentence (See Exhibit "B") could not have understood his rights to Counsel; he the above mentioned defend-
[fol. 35] ant believed then, when asked if he "desired counsel," and answered "No" that he would be forced to pay the lawyer in the event of conviction or aquittal. Having no funds and no relatives that could come immediately to his assistance, plead guilty to the indictment.

9. That under the laws of New York State (See McKinney's Consolidated Laws, Book 66, Part 1 (sec. 8, sub. 2; 188, 308, and cases cited therein, set forth the constitutional requirements that a prisoner is entitled to the "Counsel and aid of a lawyer." This is also guaranteed by the provision in Article 1, Sec. 6 of the New York State Constitution, and under the petitioner's asserted rights of the Article 14 of the Amends. to the U. S. Constitution.

10. That Decisions of both the State and Federal Courts have decided in recent years that youths of the age of 16 years cannot Intel-igently and Competently waive their rights (see People v. Sedlak 1944, 53 N. Y. S. 2nd 51, and also other cases cited under section 308; People ex rel. Moore v. Hunt 16 N. Y. S. 2nd 24; Johnson v. Zerbert 1938, 304 U. S. 458, 58 S. C. 1019, 82 L. Ed. 1461, 146 A. L. R. 357.

11. That petitioner has made no other application for the relief herein sought to any other Court nor has any relief been granted or denied.

12. Wh. fore petitioner prays for relief that an order issued from the Court addressed to J. Vernal Jackson to bring the petitioner before the Court for a full and fair
[fol. 36] adjudication of his asserted rights under the Con-

stitution, that the illegal judgment of conviction be vacated and set aside, that other and further relief be granted.

Respectfully submitted, Marvin Peter Gayes, Petitioner in pro se, Box B # 27432, Dannemora, N. Y.

Sworn to and subscribed before me this 13 day of May 1946. John R. Cain, Notary Public, Clinton County, N. Y.

[fol. 37] EXHIBIT "A" TO PETITION

State of New York, Executive Department, Division of Parole

Clinton Prison Institution

Date: Dec. 14, 1943.

Name: Marvin Gayes.
Number: 27432.

The Board of Parole at the Dec. 14, 1943, meeting rendered the following decision in your case:

Start New Sentence Dec. 14, 1943.

[fols. 38-39] Exhibit "B" to petition omitted. Printed side page 3, ante.

[fol. 40] EXHIBIT "C" TO PETITION

RECORD OF CONVICTION—PLEA GUILTY

At a term of the County Court held at the Court House in the City of Schenectady, in and for the County of Schenectady, and State of New York on the 15th day of October, A.D. 1941.

Present: Hon. James W. Liddle.

RECORD OF CONVICTION

THE PEOPLE OF THE STATE OF NEW YORK

vs.

MARVIN PETER GAYES

The defendant Marvin Peter Gayes, having been charged with the crime of Burglary in the Third Degree and having been indicted by the Grand Jury of the said City and County of Schenectady (Jurors for the People of the State of New York), duly summoned, sworn *at* charged at a term of Supreme Court held at the aforesaid Court House, in and for said County, on the 18th day of September, A. D. 1941, for that at the City of Schenectady, in the county aforesaid, on the 15th day of June A.D. 1941, he;

Marvin Peter Gayes with Harry Davis and William Charles Donovan, broke and entered a building known as "Scottys Radio Service," at 914 State *State* Street, in the City of Schenectady, conducted by one Alexander Harris with intent to commit therein the crime of larceny contrary to section 404 of the Penal Law of the State of New York, and against the peace of the People of the State of New York, and their dignity.

And the said Marvin Peter Gayes having been duly arr-igned upon said indictment and pleaded not guilty thereto [fol. 41] on the 19th day of September 1941, at a term of Supreme Court, County of Schenectady, before Supreme Court Judge John Alexander, and thereafter the said Marvin Peter Gayes, on the 14th day of October, 1941 at a term of County Court, to which Court said indictment had been duly sent for trial before County Judge James W. Liddle, withdrew said plea of not guilty and entered a plea of Guilty.

And afterwards said Court having appointed the 15th day of September, 1941, as the time for pronouncing judgment herein against defendant, and on motion of Thomas W. Wallace, District Attorney of said County, and after defendant appeared for judgment herein, and after having been asked by the clerk whether he had any legal cause to show why judgment should not be pronounced against him, and no legal cause having been shown and no sufficient cause being alleged or appearing to the said Court, why judgment should not be pronounced, the said Court thereupon on the day appointed, as aforesaid for pronouncing judgment herein and at said term of County Court did render judgment herein and sentence the said defendant, Marvin Peter Gayes, to be confined in Clinton Prison at Dannemora, New York, for a term of not less than ten (10) years or more than twenty (20) years as a second Offender.

Thomas W. Wallace, District Attorney of the County of Schenectady.

[fols. 42-43] State of New York,
County of Schenectady, ss:

Walter C. Fagel being duly sworn deposes and says that he is the Under Sheriff of the County of Schenectady, New York; that he has personal charge of the jail and the prisoners in the jail of said County; that Marvin Peter Gayes was commit-ed to said jail on the 24th day of June, 1941, and was continuously confined in this jail from said date to the date of his conviction in the County Court of said County.

Walter C. Fagel, Under Sheriff of said County of Schenectady.

Subscribed and sworn to before me this 20th day of October 1941. James W. Liddle, Schenectady County Judge.

Upon proof of the Under Sheriff of Schenectady County, I certify that Marvin Peter Gayes has been confined in the Schenectady County Jail from the 24th of June 1941, to the date of his conviction.

James W. Liddle, Schenectady County Judge.

COUNTY OF SCHENECTADY, COUNTY COURT

The People, etc., against Marvin Peter Gayes. Record of Conviction. Thomas W. Wallace, District Attorney.

[fol. 44] At a Special Term of the County Court, held in and for the County of Monroe, at the Court House in the City of Rochester, New York, on the 3rd day of June, 1946.

Present: Hon. James P. O'Connor, Monroe County Judge Presiding.

State of New York. County Court. County of Monroe.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,

vs.

MARVIN H. GAYES, Petitioner.

ORDER DENYING MOTION FOR WRIT OF CORAM NOBIS

A motion having been made by Marvin H. Gayes, Esq., for a Writ of Coram Nobis to set aside and vacate a sentence and Judgment of Conviction imposed upon him in the Monroe County Court on July 28, 1938, by Hon. William C. Kohlmetz, then County Judge of Monroe County, on his plea of guilty to the crime of Burglary, Third Degree and Petit Larceny, and the said motion having been made by the said Marvin H. Gayes upon the ground that he was deprived of his Constitutional right to assistance of counsel, and the said motion having come on to be heard before Hon. James P. O'Connor at a Special Term of the County Court of Monroe County on June 3, 1946, at 10:00 o'clock in the forenoon of that day, and the motion having been submitted to the Court at that time, and the District Attorney of the County of Monroe, Daniel J. O'Mara, Esq., appearing by Harry L. Rosenthal, Esq., Assistant District Attorney, and this Court having duly deliberated upon this matter, and it appearing to this Court that the motion of the petitioner should be denied, it is hereby.

Ordered, that the motion made by Marvin H. Gayes to [fols. 45-48] set aside and vacate the sentence and Judgment of Conviction imposed upon him in the Monroe County

Court on July 28, 1938, be, and the same hereby is denied in all things.

Enter:

James P. O'Connor, Monroe County Judge.

Walter H. Wickins, Clerk.

Filed Jun. 14, 1946.

[fol. 49] THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD FREE AND INDEPENDENT

To all to whom these presents shall come or may concern, Greeting:

Know Ye. That we, having examined the records and files in the office of the Clerk of the County of Monroe, of the County Court of said County, and of the Supreme Court of said State in and for said County, do find there remaining on file or entered a certain Indictment; Statement; Minutes; Record of Conviction; Letter dated July 29, 1946; copy of Reply August 2, 1946; Letter May 16, 1946 (copy); Letter May 31, 1946 (copy); 5 letters May 19, 1946; Application for Writ Coram Nobis; Order Denying Motion; Order, in an action wherein The People of the State of New York, plaintiff, and Francis Smith and Marvin H. Gayes, defendants, and the words and figures following, to wit:

. . . . . .

[fol. 50] And that the foregoing, having been compared with said original, is a true and correct copy of said original on file as aforesaid and of the whole thereof.

All which we have caused by these presents to be exemplified, and hereunto set our hand and caused the seal of our said Supreme Court to be hereunto annexed.

Witness Hon. H. Douglass Van Duser, Justice of the Supreme Court of the State of New York (7th Judicial District), at the City of Rochester, in the County of Monroe, in said State, the sixteenth day of January in the year of our Lord one thousand nine hundred and forty-seven.

Walter H. Wickins, Clerk. (Seal.)

SUPREME COURT—MONROE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

vs.

FRANCIS SMITH and MARVIN H. GAYES

I, H. Douglass Van Duser, Justice of the Supreme Court of the State of New York (Seventh Judicial District), do hereby certify that Walter H. Wickins, whose name is subscribed to the preceding exemplification, is the Clerk of the said County of Monroe, and Clerk of said Supreme Court for said County, duly elected and sworn, and that the signature of said Clerk to said certificate is genuine, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Supreme Court, and that the attestation thereof is in due form of law.

Dated at Rochester, New York, January 16, 1947.

H. Douglass Van Duser, Supreme Court Justice of the State of New York (Seventh Judicial District).

[fol. 51] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 405

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—December 16, 1946

On consideration of the motion for leave to proceed *in forma pauperis* in this case,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 52] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 405

ORDER ALLOWING CERTIORARI—Filed December 16, 1946.

The petition herein for a writ of certiorari to the County Court of Monroe County, State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 405

STIPULATION AS TO RECORD

It is hereby stipulated by and between Herbert Wechsler, Attorney for the Petitioner, and Daniel J. O'Mara (Harry L. Rosenthal, of counsel), Attorney for the Respondent in the above entitled cause:

First:-The stenographer's minutes of the arraignment of the petitioner in the County Court of Monroe County, were not known to be available at the time of the disposition of the petitioner's motion for a writ of error coram nobis and were not before the County Court when the petitioner's application was denied;

Second: The said minutes, duly certified by the Clerk of the County Court of Monroe County, may be printed as a part of the record in the United States Supreme Court on writ of certiorari to the County Court of Monroe County, reserving, however, for the judgment of the Supreme Court whether they properly constitute part of the record subject to review in the cause.

Herbert Wechsler, Attorney for the Petitioner.
Harry L. Rosenthal, Attorney for the Respondent.

FILE COPY

APR 11 1947
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 405

MARVIN GAYES,

Petitioner,

vs.

THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK

BRIEF FOR THE PETITIONER

HERBERT WECHSLER,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 405

MARVIN GAYES,

Petitioner,

vs.

THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK

BRIEF FOR THE PETITIONER

Opinion Below

The County Court of Monroe County, State of New York, wrote no opinion. Its order denying petitioner's motion to vacate the judgment of conviction and sentence appears at R. 20-21.

Jurisdiction

The County Court of Monroe County is the highest court of the State of New York in which a decision in the suit

could be had (See *Canizio* v. *New York*, 327 U. S. 82, 85; *People* v. *Gersewitz*, 294 N. Y. 163). Its final determination, embodied in the order denying petitioner's motion, was filed June 14, 1946 (R. 21). The petitioner's motion for leave to proceed in *forma pauperis* in this Court and his petition for a writ of *certiorari* were filed August 16, 1946, and granted December 14, 1946 (R. 22).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 344).

Questions Presented

1. Whether a claim of right under the Fourteenth Amendment to the Constitution of the United States was necessarily determined and denied by the order of the County Court.

2. Whether upon the facts alleged and upon those conceded the petitioner was entitled by the Fourteenth Amendment to the Constitution of the United States to have counsel assigned for his assistance before his plea of guilty was accepted by the Court.

3. Whether upon the facts alleged and upon those conceded the petitioner's right to an assignment of counsel was intelligently and competently waived.

Constitutional and Statutory Provisions Involved

The relevant provisions of the Constitution of the United States and of the Constitution and statutes of the State of New York are set forth in the Appendix, *infra*, pp. 30-34.

Statement

On May 16, 1946, petitioner acting *pro se* filed in the County Court of Monroe County, New York, an application and verified petition for "writ of coram nobis", written

in long hand (R. 13-17), embodying a motion to vacate a judgment of that Court rendered on July 28, 1938, convicting him of the crimes of burglary in the third degree and petit larceny and sentencing him to imprisonment in the New York State Vocational Institute at West Coxsackie, New York, for an unspecified term.

The petition and accompanying exhibits showed:

Petitioner and a co-defendant were indicted on July 13, 1938, for the crimes of burglary in the third degree and petit larceny. They were arraigned on July 15, pleaded guilty to the crimes charged and were sentenced on July 28. The petitioner was sentenced to confinement in the New York State Vocational Institute [1] and his co-defendant was placed on probation for five years.

The indictment, on file in the County Court and incorporated in the present record (R. 1-2) charged that the defendants "broke and entered the building and garage of Francis Marolow, doing business under the name and style of Pontiac Garage, with intent to commit therein the crime of larceny" and, in a second count, the theft of the following property "to wit, cigarettes of the value of seventy-five cents ($.75), two flashlights of the value of One Dollar ($1.00) and Three Dollars ($3.00)" in currency.

The record of conviction (Exhibit B, R. 17, 2-3), a printed form with entries made by hand, recited, *inter alia*, that the "defendants having been brought into Court for arraignment on the 15 day of July, 1938, each was asked

[1] Such a sentence, imposed under N. Y. Penal Law Sec. 2184-a for an unspecified term, carried a maximum term of ten years, the maximum for burglary in the third degree as a first offense under the statute defining that crime, N. Y. Penal Law Sec. 407(3). Parole and discharge from the Vocational Institute is governed by rules of the executive authority, formerly the Commissioner of Correction and now the State Board of Parole (See N. Y. Correction Law Sec. 338, as amended by L. 1945, C. 678 § 13).

if he desired the aid of counsel, to which each answered, 'No' and the said defendants were thereupon arraigned upon the indictment, to which each pleads that he is Guilty." It further recited that upon examination by the Court before judgment was pronounced, petitioner stated that he was "born at Savannah, Ga.; resides at S. P. C. C. at Rush, N. Y.; age 16 years; single; parents —— ——; occupation, student; education 2 yr. High; Had religious instruction; habits, temperate; once before convicted."[2]

The petition alleged that the conviction and sentence were rendered "in violation of petitioner's Constitutional Rights"; that he "was not informed of his Constitutional Rights of assistance of Counsel"; that he "was 16 years of age at the time of sentence [and] could not have understood his rights to counsel"; that "he believed, then, when asked 'if he desired counsel,' and answered 'No' that he would be forced to pay the lawyer in the event of conviction or acquittal"; that having "no funds and no relatives that could come immediately to his assistance" he "plead guilty to the indictment." Taking note of the recital in the record of conviction, the petition averred that the record "is silent" as to whether petitioner was informed of the protection accorded his right to counsel under the New York Constitution and Statutes; that the right is "also guaranteed" by "Article 14 of the Amends. to the U. S. Constitution"; that the question "to be attacked or con-

---

[2] An unsigned, unattested document entitled "Statement of Defendant," included in the present record (R. 4A) contains the following entries under the heading "Previous Court Record": *Date:* January 14, 1938; *Place* Toronto; *Offense:* Burg. 3rd; *Court*: Toronto, Canada; *Disposition*: 6 months (sic) & deported.

The crime of burglary is not, however, classified according to degrees in Canada (Criminal Code [Rivard, 1939], Part VII, Sec. 455, *et seq.*).

tested" is not the "presumption of regularity" but whether "the petitioner Inteligently (sic) and Competently Waived his rights or Inteligently (sic) and Competently understood his rights to assistance of Counsel" and, finally, that "State and Federal Courts have decided in recent years that youths of the age of 16 years cannot inteligently (sic) and competently waive their rights" (R. 15-16).

The petition also showed that the petitioner has completed serving the sentence to which this challenge is addressed. He is, however, now imprisoned under a sentence of ten to twenty years imposed upon him as a second offender on October 15, 1941, by the County Court of Schenectady upon his plea of guilty to burglary in the third degree.[3] The petition attacks this judgment as "illegal and void" because of the invalidity of the earlier conviction upon which the sentence as a second offender was based. Moreover, as Exhibit "A" (R. 17) to the petition shows, from October 15, 1941, the date of the second conviction, to December 14, 1943, petitioner was imprisoned under the first rather than the second sentence, for not until the latter date did the Division of Parole order that petitioner start serving the new sentence.

After filing his motion to vacate the judgment and sentence of the Monroe County Court, petitioner was advised by a letter from the judge of that Court dated May 16, that his "motion has been placed on the Regular Special Term of this court for June 3rd, 1946 at 10 A. M. at which time you may appear by counsel and in the absence of counsel, your motion will be considered on the moving papers" (R. 7). On May 19, 1946, petitioner sent to the Clerk

[3] The record of conviction of this offense (R. 18-19) does not recite the appearance of counsel or any statement made to the petitioner or by him with respect to counsel.

of the County Court, asking that it "be filed as part of moving papers" (R. 10), a petition to the judge in answer to his letter of May 16 (R. 8-9). This communication stated that the petitioner "who is now being detained at Clinton Prison, has no funds available in order to procure counsel, nor any one reasonably interested, or relatives who may come to his aid" and requested that he be given copies of the papers "to be used in Opposition (sic), so that petitioner may traverse the return and make the proper denial of allegations not conceded by District Attorney" and that he "be given Court assigned counsel to argue the petition" and "a copy of the transcript of such hearing." He also forwarded a letter to the District Attorney purporting to request the service upon him of answering papers at least eight days before the return day of the motion (R. 10). On May 31, he received a reply from the judge of the County Court stating: "I believe my letter of May 16, 1946, fully advises you as to the status of your motion which has been placed on the Regular Special Term calendar for June 3, 1946, at 10 A. M., as you were previously advised" (R. 7).

On June 14, 1946, the County Court entered an order reciting that the motion "having come on to be heard" on June 3 and "having been submitted to the Court at that time", the District Attorney appearing by an Assistant, and "it appearing to this Court that the motion of the petitioner should be denied", it "hereby is denied in all things."

There were no answering papers. The petitioner was neither present nor represented. No evidence was taken. There was no opinion. There were no findings of fact (R. 20-21).

After this Court granted a writ of *certiorari* counsel appointed to represent the petitioner was advised by the District Attorney that the Court stenographer's minutes of

petitioner's arraignment had been found to be available. The minutes are incorporated in the present record (R. 5-6), pursuant to a stipulation of counsel (R. 23) that "they were not before the County Court when the petitioner's application was denied." The stipulation reserves for the judgment of this Court "whether they properly constitute part of the record subject to review in the cause."

The minutes show that the defendant appeared without counsel. An Assistant District Attorney verified the spelling of the defendant's name and summarized the indictment. The further entries are as follows:

> Q. [by the Assistant District Attorney] . . . Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment?
>
> A. No, sir.
>
> Q. What is your plea?
>
> A. Guilty.
>
> Q. You have not received any promises from the district attorney or any member of his staff as to what disposition will be made of your matter?
>
> A. No, sir.
>
> The Court: Adjourned to July 25 for sentence.
>
> July 25, 1938—10 A. M. Same appearances as noted.
>
> The Court: This matter is adjourned to July 28 at ten o'clock.
>
> July 28, 1938—10 A. M. Same appearances as noted.
>
> Mr. Henry: The People move this matter for sentence.
>
> The Clerk: Have you any legal cause to show why the judgment of the Court should not now be imposed upon you?
>
> The Court: Have you anything to say?
>
> Marvin H. Gayes: No, sir.
>
> The Court: It is the sentence of the Court that you be committed to the New York State Vocational School at West Coxsackie, New York, and dealt with there according to law.

Specification of Errors to Be Urged

The County Court of Monroe County, New York, erred:

1. In denying the motion to vacate its judgment of conviction of burglary in the third degree and petty larceny, rendered July 28, 1938, and the sentence based thereon.

2. In holding that on the facts alleged in support of the motion the petitioner was not entitled by the Fourteenth Amendment to have counsel assigned for his assistance before his plea of guilty was accepted by the Court.

3. In holding that on the facts alleged petitioner's right to an assignment of counsel was intelligently and competently waived.

4. In denying petitioner an opportunity to present evidence in support of his motion.

5. In failing to hold that the judgment of conviction and sentence of July 28, 1938, deprived the petitioner of his liberty without due process of law, in violation of the Fourteenth Amendment.

6. In failing to vacate the judgment and sentence of July 28, 1938.

Summary of Argument

I

New York has established a "corrective judicial process" to vindicate the claim that a judgment of conviction under which the State has undertaken to imprison violates the Contion of the United States. The remedy is afforded by motion to vacate the judgment and sentence in the nature of *coram nobis*. It is settled that the remedy is available when the claim of invalidity rests on denial of the right to counsel guaranteed by the Fourteenth Amendment; that the claim may be supported by evidence *dehors* the record; and that the record itself may be corrected if it embodies a mistaken recital of fact. It is also clear that petitioner's

standing is unaffected by the fact that he has served the sentence. For the judgment is an operative element in determining the sentence under which he is now imprisoned as well as the dates of its inception and its end. If the former conviction was invalid, he is now entitled to be resentenced according to law.

There was, therefore, no "local inadequacy" in the petitioner's motion which might support the judgment of the County Court. The order of that Court denying the motion without answer or evidence necessarily held that, on the facts alleged or established by the petition and accompanying exhibits, the Fourteenth Amendment does not confer a right to the assignment of counsel or the right was effectively waived. On either branch of the hypothesis, a Federal right was asserted and erroneously denied.

II

The petitioner's need for counsel is plainly established by the facts. A child of sixteen, indigent and alone, patently unable to retain an attorney, he was charged with a serious offense in an ordinary criminal court. At no point in the proceeding, as the minutes of the arraignment show (R. 5-6), was he accorded protective assistance either by the Prosecutor or by the Court. If he was innocent of any wrongdoing, he obviously could not conduct a trial. If he was guilty of some offense, he could not know whether it was the crime charged or some lesser offense, such as the misdemeanor of unlawful entry. Even if he was guilty as alleged, he could not invoke that conventional exercise of discretion that mitigates the rigor of the criminal law by conviction of a lesser offense than that charged. Even after conviction of the crime charged, he needed representation upon the sentence.

If the petitioner was in need of counsel, the Fourteenth Amendment made the assignment of an attorney his right.

The decisions of this Court establish that, whatever the standard to be applied, a conviction in a State court cannot be maintained under the Constitution if a defendant who needs counsel is deprived of such assistance in the face of a serious charge, because he cannot afford to hire a lawyer and none is assigned by the Court. Nothing either said or held in *Betts* v. *Brady*, 316 U. S. 455 would deny the right to an assignment of counsel in the case of a sixteen year old boy. The decisions make clear that when the need for counsel is patent, an assignment is a constitutional necessity unless the right is effectively waived.

III

If the facts alleged and conceded establish a right to an assignment of counsel, they also show that the right was not intelligently and competently waived. Whatever difference there may be as to the scope of the right to counsel guaranteed by the Fourteenth and the Sixth Amendments, there is no basis for maintaining any difference in the test that determines whether the right was waived. A waiver must be intelligent and competent. The defendant must know of his right, voluntarily choose to forego it and have the capacity to make the choice. Neither knowledge nor competence is established on the facts that are determinative here.

It is true that the record of conviction recites that the defendant answered "No" to the question whether he desired counsel. But the petitioner alleged that he did not understand the question to indicate that counsel could or would be assigned by the Court; and that he answered in the belief that counsel would require a fee that he could not afford to pay. This sufficed to put knowledge in issue. Moreover, the minutes of arraignment, which were not before the court below, show that nothing was actually said about assignment, that petitioner received no instruction as

to his rights or the meaning and consequences of his plea, that no inquiry was undertaken as to his understanding or his capacity either to waive counsel or to plead.

The petitioner is thus entitled, at the least, to prove, if he can, that he did not know and, therefore, could not intelligently waive his right to an assignment of counsel upon his arraignment in the County Court. We submit, beyond this, that the conceded facts establish his incompetence to waive counsel, as a matter of law. For no amount of individual precocity could sustain the view that a boy of sixteen was competent, unaided, to choose to forego counsel; and we know from the minutes of arraignment that he had no assistance from the Court. There is no more room for finding waiver here than in the case of the seventeen year old defendant in *De Meerleer* v. *Michigan* (No. 140, Present Term) where this Court recently set aside a conviction upon the record made when it occurred.

ARGUMENT

The petitioner contends that the order of the County Court denying his motion to vacate the judgment and sentence, entered without an answer to the motion or evidence on the issues posed, necessarily held that, on the facts alleged and upon those conceded, the Fourteenth Amendment does not confer a right to the assignment of counsel or the right was effectively waived. We submit that on either branch of the hypothesis a Federal right was asserted and erroneously denied.

I

A Claim of Right under the Fourteenth Amendment Was Necessarily Denied by the County Court

A. *The Established Procedure in the State Court*

New York has not been derelict in the duty laid upon all the States by *Mooney* v. *Holohan*, 294 U. S. 103 and later

decisions to provide a "corrective judicial process" through which a litigant may vindicate the claim that a judgment of conviction under which the State has undertaken to imprison violates the Constitution of the United States. The remedy, afforded in the Federal courts and in some of the States by writ of *habeas corpus* (e.g. *Johnson* v. *Zerbst*, 304 U. S. 458; *Williams* v. *Kaiser*, 323 U. S. 471), is provided in New York—when appeal is an inadequate remedy—by a motion to vacate the challenged judgment in the nature of *coram nobis* (*Matter of Lyons* v. *Goldstein*, 290 N. Y. 19, 25; *Matter of Morhous* v. *N. Y. Supreme Court*, 293 N. Y. 131, 136; *People* v. *Gersewitz*, 294 N. Y. 163, 167; *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 9). That a judgment may be attacked upon such a motion for denial of the right to counsel guaranteed by the due process clause of the Fourteenth Amendment and Article I, Section 6, of the State Constitution has been explicitly held by the Court of Appeals (*Matter of Hogan* v. *Court of General Sessions, supra* p. 9) and twice acknowledged by this Court (*Canizio* v. *New York*, 327 U. S. 82; *Carter* v. *Illinois*, No. 36 Present Term, decided December 9, 1946, slip opinion p. 3; see also *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688, 690).

There is, moreover, no limitation of the inquiry, as in Illinois, to facts shown on the common law record (*Carter* v. *Illinois, supra*); evidence may be offered *dehors* the record to show that a conviction regular upon its face was in fact the fruit of an unconstitutional invasion of right (*Matter of Hogan* v. *Court of General Sessions, supra* at 9; *Matter of Morhaus* v. *N. Y. Supreme Court, supra* at 140; *cf. De Merleer* v. *Michigan*, No. 140 Present Term, decided February 3, 1947). The duty of the Court if material issues of fact are presented is to conduct a hearing and take the relevant evidence (*Matter of Hogan* v. *Court of General Sessions, supra* at 8-9; *People ex rel. Hirsch-*

berg v. *Orange County Court*, 271 N. Y. 151, 157). Determination without a hearing is possible, as in Federal *habeas corpus* (*Walker* v. *Johnston*, 312 U. S. 275; *Holiday* v. *Johnston*, 313 U. S. 342), only if the motion fails as a matter of law to state a case for relief (*Matter of Hogan* v. *Court of General Sessions*, *supra*).

Moreover, unlike *habeas corpus* which involves a collateral attack, the motion is not precluded from impeaching the verity of the record (*Cf. Riddle* v. *Dyche*, 262 U. S. 333). For the motion is made in the sentencing court which, having control of its records, has the power to correct its mistakes (*People ex rel. Hirschberg* v. *Orange County Court*, *supra*; *People* v. *Craig*, 295 N. Y. 116, 119; *People* v. *Berezac*, 266 App. Div. 813). Correction of the record for clerical error is, indeed, the procedural progenitor of the motion to vacate for denial of fundamental right now recognized by the Court of Appeals (See *Matter of Lyons* v. *Goldstein*, *supra* at 26).

B. *The Petitioner's Standing to Attack the Conviction*

It is immaterial that the petitioner has completed service of his sentence under the conviction he now attacks. For that conviction plays a major part in determining the length of the term of imprisonment under which he is presently held. Had he been sentenced in 1941 as a first rather than a second offender, the maximum sentence permitted by the statute would have been five to ten years (N. Y. Penal Law Secs. 2189, 407) and he might have been sent to Elmira reformatory (N. Y. Penal Law Sec. 2185; N. Y. Correction Law Secs. 288, 289, 296). The sentence of ten to twenty years was mandatory if he was found to be a second offender (N. Y. Penal Law, Sec. 1941). Moreover, the date of inception of the petitioner's present sentence was postponed from June 24, 1941, when his confinement began on the arrest that culminated in the 1941 conviction

(R. 19; see N. Y. Penal Law Sec. 2193), to December 14, 1943, when the Board of Parole directed that service of the second sentence begin (R. 17). During the interval he was held under the earlier sentence (See N. Y. Penal Law Sec. 2190; N. Y. Correction Law Secs. 338, 219; *Canfield* v. *Morhous*, 265 App. Div. 101) and the date of termination of his present sentence was correspondingly postponed.

In light of these facts, it is clear that the cause is not moot; the petitioner suffers "further penalties" on two scores in consequence of the conviction he attacks (see *Fiswick* v. *United States*, No. 51 Present Term, decided December 9, 1946, slip opinion p. 8; *cf. St. Pierre* v. *United States*, 319 U. S. 41). It is equally clear that state law affords a procedure by which these further penalties may be removed. If the 1938 conviction is held void, petitioner may move to vacate his present sentence in the Schenectady County Court and for resentencing according to law (see *People ex rel. Sloan* v. *Lawes*, 255 N. Y. 112; *People ex rel. Carollo* v. *Brophy*, 294 N. Y. 540; *People* v. *Keller*, — Misc. —, 37 N. Y. Supp. (2d) 61). Upon resentence as a first offender, the statute will prescribe no minimum and the Court will presumably take into account the time that petitioner will have served under a void sentence. Before moving for resentence, however, petitioner must overturn the 1938 conviction; the proper forum in which to level that challenge is the Court in which the conviction occurred. Hence, the New York Courts, so far as we know without dissenting voice, have sustained the propriety of a motion to vacate a former conviction which plays an operative part in determining a subsequent sentence under which the petitioner is imprisoned when the motion is made (*People* v. *Bernoff*, — Misc. —, 61 N. Y. Supp. (2d) 46; *People* v. *Foster*, 182 Misc. 73; *People* v. *Paterno*, 187 Misc. 56; *cf. People* v. *Gersewitz*, 294 N. Y. 163, 167; see *People* v. *Keller*, — Misc. —, 37 N. Y. Supp. (2d) 61, 63.

C. *The Ruling of the County Court*

The foregoing considerations wholly preclude the assumption that the County Court "found a local inadequacy" (Frankfurter, J. dissenting in *Williams* v. *Kaiser*, 323 U. S. at 483) in the petitioner's motion and denied it for such cause. Unlike *Williams* v. *Kaiser, supra; Tompkins* v. *Missouri*, 323 U. S. 485 or *Rice* v. *Olsen*, 324 U. S. 786, where the issue divided this Court, there can be no contention in the present case that the judgment, unexplained by findings or opinion, rests upon an adequate state ground.

The verified petition alleged—inartistically but none the less plainly—that the judgment and sentence were void because the petitioner was not assigned counsel or told upon his arraignment that he had the right to have counsel assigned; that he was sixteen years old, indigent, without family or friends who could come to his aid; that even though he was asked if he "desired counsel," as the record of conviction recites (inaccurately as we now know, in that the word was not "desire" but "need" [R. 5]), he did not understand this to mean that he would be assigned a lawyer if he could not pay a fee; that having nowhere to turn for assistance he pleaded guilty to the indictment; and, finally, that in view of his misunderstanding and his age, he cannot be held to have waived his right, guaranteed by the Fourteenth Amendment and the Constitution and statutes of the State.

These were the allegations before the County Court when the petition and the exhibits are read together. Since no evidence was taken, it must be assumed that the allegations of fact were true (*Williams* v. *Kaiser, Tompkins* v. *Missouri, Rice* v. *Olsen, supra*). Rejection of any as false, without according the petitioner an opportunity to offer evidence in their support, would deny due process in

"the primary sense," in violation of the Fourteenth Amendment (see *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673, 681; *cf. Saunders* v. *Shaw,* 244 U. S. 317, 319; *Snyder* v. *Massachusetts,* 291 U. S. 97, 116, 128). Thus the Court necessarily determined that on the facts alleged the conviction infringed no fundamental right under State or Federal law. It necessarily held that, though the allegations are assumed to be true, the Fourteenth Amendment does not accord a right to the assignment of counsel or the right was effectively waived. The ruling on the Federal questions is subject to review by this Court. *Canizio* v. *New York, supra; Williams* v. *Kaiser, supra; Herndon* v. *Lowry,* 301 U. S. 242, 247.

II

Upon the Facts Alleged and upon Those Conceded Petitioner Was Entitled by the Fourteenth Amendment to Have Counsel Assigned for His Assistance Before His Plea of Guilty Was Accepted by the Court.

That petitioner was in need of counsel upon his arraignment suffices, we contend, to establish that he was entitled by the Fourteenth Amendment to have counsel assigned for his assistance before his plea of guilty was accepted by the Court.

First: The petitioner's need for counsel is documented by the barest rehearsal of the facts. A child of sixteen, indigent and alone, patently unable to retain an attorney, he was charged with a serious offense in an ordinary criminal court. At no point in the proceeding, as the minutes of the arraignment show (R. 5-6), was he accorded protective assistance either by the Prosecutor or by the Court. Without the aid of counsel he was helpless in the web of the law. If he was innocent of any wrongdoing, he obviously could not conduct a trial. If he was

guilty of some offense, he could not know whether it was the crime charged. If he was guilty as the indictment alleged, he could not invoke that discretion with respect to the grade of conviction and the sentence that is exercised, as a conventional matter, to mitigate the rigor of the criminal law.

Burglary in the third degree is a creature of statute. The crime is defined in New York in technical terms. There must be a breaking as well as an entry with intent to commit a crime or, if a crime is committed in a building, there must be a breaking out (N. Y. Penal Law Sec. 404, 400). Entry or exit, through an open door, without threat or artifice, is not a breaking. Entry alone, without breaking, is a misdemeanor and nothing more (N. Y. Penal Law Sec. 405). Students have trouble with these distinctions. The petitioner could not have known how they applied to his situation, even if he was implicated in the petty theft alleged.

Moreover, professional experience attests that petitioner's need for counsel was not limited to assuring a precise measurement of the facts by the law. One of the dominant characteristics of criminal law administration is the exercise of discretion—by prosecutors and courts in accepting pleas of guilty and by juries in rendering verdicts—to convict of offenses lesser than those charged. Statistical data, though inadequate, serve to illustrate the facts. In New York City in 1938, the year of the petitioner's conviction, defendants pleading to indictments of burglary numbered 1499. Of these, 1289 entered pleas of guilty, 201 or 13.4 per cent to the offense charged, 1088 or 72.5 per cent, to lesser offenses. Of 210 defendants standing trial, 82 were acquitted; 28, or 13 per cent of those convicted, were found guilty of lesser offenses. Indictments for burglary culminated in convictions of the misdemeanor of unlawful entry in 476 cases. *Twelve Months of Crime in New York City,*

A Report by the Citizen's Committee on the Control of Crime (1938) pp. 12, 32.[4] What is involved in this typical representation is not a nullification of the law but individualization in its application, a mitigation inherently necessary in a system that lays down punishments so severe. Thus, even if petitioner had no defense to the charge, he needed counsel to invoke the exercise of this practical discretion. A plea of guilty to unlawful entry would have authorized commitment to the New York State Vocational Institute (N. Y. Penal Law Sec. 2184-a). But it would have saved a sixteen year old boy from the stigma and disability of conviction of a felonious crime.

Finally, apart from the considerations noted, petitioner needed counsel with respect to his sentence which, even on the felony conviction, was discretionary with the Court (N. Y. Penal Law Sec. 2188).

Second: If, as we have urged, the petitioner was in need of counsel, we submit that the Fourteenth Amendment made the assignment of an attorney his right. This is the plain meaning of the "notable chapter in the history of liberty" (Frankfurter, *Law and Politics*, p. 189) begun by this Court in *Powell* v. *Alabama*, 287 U. S. 45 and developed by later decisions, including those at the Present Term.

Powell's case involved, it is true, a capital charge culminating in a sentence of death under circumstances that made the absence of counsel only one among many defects. But the other factors were accorded significance only because they showed how "vital and imperative" (287 U. S. at 71) the necessity of counsel was. The articulate principle of the decision was that a defendant "incapable adequately of making his own defense" must be assigned

[4] A similar result is shown for the following year. See *Crime in New York City in 1939*, Report of the Citizen's Committee on the Control of Crime (1939).

counsel as "a necessary requisite of due process of law", a "logical corollary from the constitutional right to be heard" (287 U. S. at 71, 72). Whatever has been said, therefore, in emphasis of the extreme situation presented (See *Palko* v. *Connecticut*, 302 U. S. 319, 327), the opinion "keeps the word of promise to the ear" (Cardozo, *Law and Literature*, p. 109); the promise has not been broken "to the hope".

It is now clear that the Fourteenth Amendment does not safeguard the right to counsel in capital cases alone (*Rice* v. *Olsen*, 324 U. S. 786; *White* v. *Ragen*, 324 U. S. 760; *Canizio* v. *New York*, 327 U. S. 82; *cf. Williams* v. *Kaiser*, 323 U. S. 471; *Tompkins* v. *Missouri*, 323 U. S. 485), a limitation that would have accorded sentimental priority to the protection of life as opposed to the liberty that gives life meaning and value. The protection is not confined to cases in which the lack of counsel is aggravated by deception or other oppression, though that is constitutionally significant in itself (e.g. *Smith* v. *O'Grady*, 312 U. S. 329; *Ex parte Henry Hawk*, 321 U. S. 114; *cf. Cochran* v. *Kansas*, 316 U. S. 255). It is not restricted to cases in which there is a trial rather than a plea (e.g. *Williams* v. *Kaiser; Tompkins* v. *Missouri; Rice* v. *Olsen; Canizio* v. *New York, supra; House* v. *Mayo*, 324 U. S. 42, 46). Nor is the right to have counsel assigned conditional upon a request (*Tompkins* v. *Missouri; Rice* v. *Olsen, supra;* see *Canizio* v. *New York, supra* at 85). The governing principle that emerges from these decisions is that the Fourteenth Amendment accords a right to the assignment of counsel whenever the assignment is a significant need.

This Court has, to be sure, refrained from formulating a limitation upon the States under the Fourteenth Amendment in terms as absolute as that which the Sixth Amendment imposes on the Federal courts (*Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275; *Glasser*

v. *United States*, 315 U. S. 60; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269; *U. S. ex rel McCann* v. *Adams*, 320 U. S. 220), despite strong conviction, uttered in dissent, that the Fourteenth Amendment makes the Sixth no less than the First applicable to the action of the States (See Black, J. dissenting in *Betts* v. *Brady*, 316 U. S. 455, 474-5; *cf. Snyder* v. *Massachusetts*, 291 U. S. 97; *Palko* v. *Connecticut, supra; Malinski* v. *New York*, 324 U. S. 401; *Louisiana* v. *Resweber*, No. 142, Present Term). But belief that the due process clause of the Fourteenth Amendment was not intended as "a compendious expression of the original Bill of Rights" and insistence that some of these safeguards "were built on experience of relative and limited validity" (Frankfurter, J. concurring in *Malinski* v. *New York, supra* at 414) does not impair the view that neither essential "fairness" nor "ample opportunity to meet an accusation" nor the "ultimate dignities of man" (*Carter* v. *Illinois, supra*, Slip Opinion pp. 1, 2) nor "civilized standards of law" (*Malinski* v. *New York, supra* at 414) are satisfied if a defendant who needs counsel is deprived of such assistance in the face of a serious charge, because he cannot afford to hire a lawyer and none is assigned by the Court.

Third: Betts v. *Brady, supra*, will be cited as opposed. While we question its consistency with later decisions and point to difficulties under the opinion as it stands, it does not impair the basic principle that the Fourteenth Amendment confers a right to the assignment of counsel if there is a showing of the need.

The defendant was convicted of robbery in a Maryland court after a trial without a jury in which, unable to afford an attorney, he was compelled to defend himself. His conviction was held compatible with due process. The reasons assigned were, in substance, that the case involved the "simple issue of the veracity of the testimony"

bearing on an alibi defense; "the accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue", who had previously pleaded guilty to larceny, served a sentence and "was not wholly unfamiliar with criminal procedure"; and, finally, the trial was by the Court, upon a waiver of jury, with the judge "in a much better position to see impartial justice done than when the formalities of a jury trial are involved" (316 U. S. at 472). These considerations were held to show that the petitioner was not "at a serious disadvantage by reason of the lack of counsel"; and it was added that under the Maryland law, if there had been such a disadvantage, "a refusal to appoint would have resulted in the reversal of a judgment of conviction" (316 U. S. at 473).

We think the most that the decision held is that the Fourteenth Amendment imposes no duty to appoint counsel when there is no genuine need; that no such need was established in the particular case; and, finally, that the Maryland law was not vulnerable as a whole because it did require appointment where "serious disadvantage was shown." The decision is so interpreted *per curiam* in *White* v. *Ragen* (*supra* at 764) by citation, in comparison with later cases, to support the statement that due process requires that "a defendant on trial in a State court upon a serious criminal charge and unable to defend himself shall have the benefit of counsel." We think the later cases properly establish a more generous, more realistic standard for appraising the extent of the inability or the need (see also *Mitchell* v. *Youell*, 130 F. (2d) 880 (C. C. A. 4th)), but nothing either said or held in *Betts* v. *Brady* would deny their existence or their gravity in the case of a sixteen year old boy.

There are, it is true, interpretations of *Betts* v. *Brady* to the effect that the Constitution of the United States

accords a right to the assignment of counsel only if the right to an assignment is conferred by State law (*Mayo* v. *Wade*, 158 F. (2d) 614 (C. C. A. 5th) pending on Petition for *Certiorari*, No. 1022, Present Term; See also *Hoelscher* v. *Howard*, 155 F. (2d) 909, 912 (C. C. A. 7th)). Were that the case, the petitioner would not be disadvantaged for the duty to assign in all criminal cases in which a defendant desires counsel and to advise him of his right is specifically imposed by the law of New York (Code of Criminal Procedure, Secs. 308, 8; see also N. Y. Constitution Art. I, Sec. 6; *People* v. *McLaughlin*, 291 N. Y. 480, 482-483; *People ex rel. Moore* v. *Hunt*, 258 App. Div. 24). We cannot believe, however, that the requirements of the Federal Constitution are modulated to the vagaries of State law. In so far as the right of assignment is a creature of the State, its enforcement is the business of her courts. Errors or departures in this, as in other fields, would present no Federal question (see e.g. *Buchalter* v. *New York*, 319 U. S. 427), unless of course, there was a wilful and invidious discrimination constituting a denial of equal protection (*Cochran* v. *Kansas*, 316 U. S. 255; *Hysler* v. *Florida*, 315 U. S. 411, 422-423; *Snowden* v. *Hughes*, 321 U. S. 1). State law might be relevant, it is true, if it were urged that the State has provided some other protection which adequately substitutes for counsel[5]; but the adequacy of the alleged substitute would presumably be determined on the record before this Court. So, too, if any deference in mat-

[5] Compare the protective function of the Court in juvenile delinquency proceedings which are not treated as prosecutions for crime, though counsel is ordinarily allowed. See e.g. N. Y. Children's Court Act, Laws of 1930, c. 393; Laws of 1944, c. 632 (Proceedings Respecting Youthful Offenders); Cosulich, *Juvenile Court Laws of the United States* [1937]; Grace Abbott, *The Juvenile Court* (1936), The Survey, vol. 2, p. 131; S. and E. T. Glueck, *One Thousand Juvenile Delinquents* (1934); American Law Institute, Youth Court Act (1940); *People* v. *Lewis*, 260 N. Y. 171, *certiorari denied* 289 U. S. 709. *Cf. Prince* v. *Massachusetts*, 321 U. S. 158.

ters of this kind is to be accorded to state judgment (See e.g. Jackson, J., dissenting in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 156; *cf.* Stone, J. concurring in *Skinner* v. *Oklahoma*, 316 U. S. 535, 544; *Thomas* v. *Collins*, 323 U. S. 516, 529-530) it would presumably be accorded to the judgment embodied in the determination of State law under review. It seems clear, therefore, that the existence and scope of a Federal right that the State provide an assignment of counsel cannot depend on whether the State has purported to do so in her law. *Betts* v. *Brady* is perverted if it is thought to stand for propositions at variance with these; it is important that such confusion be dispelled.

Fourth: If we have misread the principle of the decisions, specific authority none the less supports the petitioner in the present case. At the least, *Rice* v. *Olsen*, and *Canizio* v. *New York*, *supra*, proclaim the right to an assignment of counsel under circumstances no more compelling than those that are determinative here—unless the right was effectively waived.

III

Upon the Facts Alleged and upon Those Conceded, the Petitioner's Right to an Assignment of Counsel Was Not Intelligently and Competently Waived.

If the facts alleged establish a right under the Fourteenth Amendment to the assignment of counsel upon petitioner's arraignment, they show no less plainly that the right was not intelligently and competently waived.

First: Whatever difference there may be as to the scope of the right to counsel guaranteed by the Fourteenth and the Sixth Amendments, there is no basis for maintaining any difference in the test that determines whether the right was waived. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privi-

lege"; it must be made "intelligently and competently" (*Johnson* v. *Zerbst*, 304 U. S. 458 at 464); it must be voluntary (*Walker* v. *Johnston*, 312 U. S. 275, 286); it is not established by a plea of guilty and cannot be presumed or implied as a matter of law (*Walker* v. *Johnston; Rice* v. *Olsen, supra; cf. Glasser* v. *United States*, 315 U. S. 60). A waiver is possible only if the defendant "knows what he is doing and his choice is made with eyes open" (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279). So this Court has steadfastly held, despite argument to the contrary by the Government (See *Johnson* v. *Zerbst*, *Walker* v. *Johnston*, *supra*); the position has been applied with increasing rigor in the lower Federal courts (See e.g. *Williams* v. *Huff*, 142 F. (2d) 91, 146 F. (2d) 867 (App. D. C.); *Evans* v. *Rives*, 126 F. (2d) 633 (App. D. C.); *Walleck* v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th); *Michener* v. *Johnston*, 141 F. (2d) 171 (C. C. A. 9th); *United States* v. *Steese*, 144 F. (2d) 439 (C. C. A. 3d); *Roberts* v. *United States*, 158 F. (2d) 150 (C. C. A. 4th)) and in the courts of New York (see *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1; *People ex rel. Moore* v. *Hunt*, 258 App. Div. 24, 30; *People* v. *Sedlac*, 53 N. Y. Supp. (2d) 51, 53; *People* v. *Gillette*, 185 Misc. 803, 60 N. Y. Supp. (2d) 64-65; *People* v. *Bernoff*, 61 N. Y. Supp. (2d) 46, 48-49) as well as of other States (See e.g. *State* v. *Murphy*, 248 Wis. 593, 22 N. W. (2d) 685; *State* v. *Jameson*, — S. D. —, 22 N. W. (2d) 731; *In re Stevens*, — Okl. Cr. —, 160 P. (2d) 415).

The question on waiver is thus no less than whether the defendant, with knowledge of his right, competently chose to forego it (*Cf. Adams* v. *United States ex rel. McCann*, *supra; United States ex rel. McCann* v. *Adams*, 320 U. S. 220; *Glasser* v. *United States, supra*). It is an issue on which the defendant's age, experience, intellect and capacity

are highly relevant facts (*Johnson* v. *Zerbst*, 304 U. S. at 464; *Adams* v. *United States ex rel. McCann*, *supra* at 278). Circumstances that would show a waiver by one type of defendant as to another may be entirely without force. For a waiver presupposes knowledge and competence. Neither is established on the facts that are determinative here.

Second: The petitioner's allegations, verified under his oath, put knowledge and competence in issue as plainly as written words can. If they were held inadequate to perform this function, it can only be because the Court below thought the record of conviction dispositive in reciting, by entry on the printed form (R. 2), that each defendant "was asked if he desired the aid of counsel, to which each answered 'No'." But viewed as a part of the pleading, as it must be when no issue is drawn, the recital could not have this effect. Both ignorance and incapacity are asserted and either would negate a waiver though the recital is assumed to be true.

The recital is avoided as to knowledge by allegation that petitioner did not understand the question to inquire whether he wished an assignment of counsel to which no reference was made; that he answered in the belief that the only lawyer in contemplation would require a fee that he could not pay. The recital is avoided as to competence by allegation that a sixteen year old boy "could not have understood his rights". Whatever, therefore, may be the evidentiary value of such a recital in a proceeding in which the record is not conclusive (see p. 13, *supra*), it does not impede the allegations of the motion from stating a meritorious case (*Cf. Williams* v. *Huff*, *supra*).

This Court has heretofore insisted that applications drawn by indigent prisoners *pro se* must be read with a modicum of largesse (*Cochran* v. *Kansas*, *supra* at 257, 258; *Rice* v. *Olsen*, *supra*). The wisdom of the insistence is il-

lustrated by the present case. After judgment in the Court below the stenographer's minutes of petitioner's arraignment have been found to be obtainable (R. 5, 6). Under the law of New York, they are a part of the record in the case (Code of Criminal Procedure Sec. 485; Judiciary Law Sec. 292; *cf. Canizio* v. *New York, supra; People* v. *Duell*, 55 N. Y. Supp. (2d) 247 (Co. Ct.)). They dispel any overtones that might be produced by the formal record of conviction, on the theory that a judge need not "recite with particularity that he performed his duty" (*Carter* v. *Illinois, supra*, Slip Opinion, p. 5; but *cf. People* v. *McLaughlin*, 291 N. Y. 480 at 483). They show that the petitioner was not told that counsel would be appointed to assist him if he desired an attorney's aid; that he was given no instruction as to the statute under which he was indicted, as to his rights as a defendant or the meaning and consequences of his plea; that no inquiry was undertaken as to his understanding or his capacity either to waive counsel or to plead. All that preceded the plea was a prosecutor's summary of the indictment, his question: "Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment", and the further inquiry whether the defendant had received "any promises from the district attorney or any member of his staff as to what disposition will be made." Except for announcing two adjournments and asking the prisoner if he had anything to say, the actual imposition of the sentence was the only word that came from the bench. The circumstances might well be held inadequate to assure that an adult defendant was informed of the right (*Cf. Michener* v. *Johnston, supra; Voigt* v. *Webb*, 47 F. Supp. 743, 747 (D. C. Wash.); *Robinson* v. *Johnston*, 50 F. Supp. 774 (D. C. Calif.); see also *Wood* v. *United States*, 128 F. (2d) 265, 277 (App. D. C.)). Far more explicit admonition has been held insufficient in the case of a youth (*Williams* v. *Huff, supra*).

It understates the position to say that these minutes are of the utmost importance. The court below, in deciding erroneously that no issue of fact was tendered by the motion, deprived itself, in practical effect, of the only real light shed by its own records on what actually happened in the Court. For the minutes would not have been found to be available if the writ of certiorari had not been granted by this Court.

Third: The petitioner is thus entitled, at the least, to give his evidence that he did not know and, therefore, could not intelligently waive his right to an assignment of counsel upon his arraignment in the County Court. This would hardly be doubted if the record were silent on the matter of counsel (*Rice* v. *Olsen; Canizio* v. *New York; People ex rel. Moore* v. *Hunt; People* v. *Sedlac; People* v. *Gillette; People* v. *Bernoff, supra*); for the reasons stated the position is no different in view of the statements that the record shows. At a proper trial of the issue as one of fact he would be aided by his own testimony, by his age and situation at the time of his arraignment and the indication in the minutes of arraignment of the scantiness of the proceedings in Court. These would be weighed in the balance against the evidence, if any is forthcoming, that might be offered on the other side. If all that were involved were the issue of knowledge, reversal would be appropriate with remand for a hearing in these terms (*Rice* v. *Olsen; Tompkins* v. *Missouri, supra*). But more is involved than the question of knowledge. On the minutes of the arraignment now in the record and the petitioner's conceded age at the time, we submit that incompetence to waive counsel affirmatively appears as a matter of law.

Fourth: Even if the petitioner knew of his right to have counsel assigned, an effective waiver was precluded because the petitioner was plainly incompetent to make the choice that the right should be waived. The question of com-

petency, like that of knowledge, may, of course, present only an issue of fact. Under the circumstances shown by the minutes of arraignment we think incompetence appears as a matter of law. Stated differently, we contend that no amount of individual precocity could sustain the view that a boy of sixteen was competent unaided to choose to forego counsel; and we know from the minutes of arraignment that petitioner had no assistance from the Court. Hence, acceptance of his plea of guilty without according him the requisite assistance was a denial of due process of law (*Cf. De Merleer* v. *Michigan*, No. 140, Present Term).

To sustain the contention we need do no more than point to *Adams* v. *United States ex rel. McCann, supra*, where the contention that an adult, litigious by experience and disposition, was incompetent to waive a jury without counsel succeeded in dividing this Court. Only the assurance that the defendant was capable of "weighing his own best interest" (317 U. S. at 280) led a majority to reject the claim advanced. That a boy of sixteen could have the capacity to make the equally difficult evaluation involved in waiving counsel and pleading guilty seems to us impossible to be supposed (*Williams* v. *Huff, supra*, especially opinion of Edgerton, J., 142 F. (2d) 91, 92). Neither the knowledge, nor the experience nor the judgment could on any hypothesis be there (See also *People* v. *Sedlac, supra*, at 53; *People* v. *Bernoff, supra*, at 49). Recognition of this is, of course, one of the major reasons for the creation of the juvenile court and the progressive extension of its principle well above the petitioner's age. If his case arose today in New York he would almost certainly have been treated as a "youthful offender", involving no charge of crime (Laws of 1944, c. 632). We do not say that the Constitution requires advances such as these. We do contend, however, that if the advances are not made, rights conferred by the Fourteenth Amendment cannot be sur-

rendered by a child, charged with a serious crime, unless he has adult guidance in making so momentous a choice. There is no more room for finding waiver here than in the case of the seventeen year old defendant in *De Meerleer* v. *Michigan, supra,* where this Court set aside the conviction upon the record made when it occurred.

Conclusion

For the foregoing reasons we respectfully submit that the judgment of the County Court of Monroe County should be reversed and the cause remanded with direction to vacate the judgment of conviction and the sentence rendered July 28, 1938, or, in the alternative, to determine after a proper hearing on the evidence whether the petitioner's right to an assignment of counsel was intelligently and competently waived.

HERBERT WECHSLER,
Attorney for the Petitioner.

March, 1947.

APPENDIX

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of New York, Article One, Section 6:

> No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No persons shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself . . .
>
> No person shall be deprived of life, liberty or property without due process of law.

New York Penal Law:

> Sec. 400. Break—The word "break," as used in this article, means and includes:
>
> 1. Breaking or violently detaching any part, internal or external, of a building; or,
>
> 2. Opening, for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein sepa-

rately used or occupied, or any window, shutter, scuttle, or other thing used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or,

3. Obtaining an entrance into such a building or apartment, by any threat or artifice used for that purpose, or by collusion with any person therein; or,

4. Entering such a building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging or breaking through or under the building, or the walls or foundation thereof.

Building. The term "building" as used in this article, includes a railway car, vessel, house trailer, booth, tent, shop, inclosed ginseng garden, or other erection or inclosure.

Dwelling-house—A building, any part of which is usually occupied by a person lodging therein at night, is, for the purposes of this article deemed a dwelling-house.

Enter—The word "enter," as used in this article, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property.

Sec. 404. A person who:

1. With intent to commit a crime therein, breaks and enters a building or a room, or any part of a building; or,

2. Being in any building, commits a crime therein and breaks out of the same,

Is guilty of burglary in the third degree.

Sec. 405. A person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a crime, is guilty of a misdemeanor.

Sec. 407. Burglary is punishable by imprisonment in a state prison as follows:

1. Burglary in the first degree, for an indeterminate term the minimum of which shall be not less than ten years and the maximum of which shall be not more than thirty years.

2. Burglary in the second degree, for a term not exceeding fifteen years.

3. Burglary in the third degree, for a term not exceeding ten years.

Sec. 1941. A person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon conviction of such second or third offense, as follows:

If the second or third felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term; provided, however, that the minimum sentence imposed hereunder upon such second or third felony offender shall in no case be less than five years; except that where the maximum punishment for a second or third felony offender hereunder is five years or less, the minimum sentence must be not less than two years.

Sec. 2184-a. Where a male person, sixteen years of age or over, but less than nineteen years of age, has been adjudicated to be a juvenile delinquent, or found to be a disorderly person, or a wayward minor, or a vagrant, or found guilty of any offense or of a misdemeanor, or of a felony, except crimes punishable by death or life imprisonment, the trial court may, instead

of sentencing him to imprisonment in a state prison or in a penitentiary, direct him to be confined in the New York house of refuge established by the society for the reformation of juvenile delinquents in the city of New York, or its successor body in law, the New York state vocational institution, under the provisions of the statutes relating thereto. The term of any person so convicted and sentenced for a felony shall not exceed the maximum term, provided by law for the crime for which the person so convicted and sentenced and in the case of any person convicted and sentenced for any other offense or for a misdemeanor, the term of imprisonment shall be for a period not exceeding three years.

Sec. 2185. A male between the ages of sixteen and thirty, convicted of a felony, who has not theretofore been convicted of a crime punishable by imprisonment in a state prison, may, in the discretion of the trial court be sentenced to imprisonment in the New York state reformatory at Elmira, to be there confined under the provisions of law relating to that reformatory.

Sec. 2189. A person never before convicted of a crime punishable by imprisonment in a state prison, or who, though previously convicted of such a crime, is not punishable under the provisions of section nineteen hundred forty-one or nineteen hundred forty-two, who is convicted in any court in this state of a felony other than murder first or second degree or kidnaping, and sentenced to a state prison, shall be sentenced thereto under an indeterminate sentence, the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum; otherwise, the minimum of such sentence shall not be more than one-half the longest period and the maximum shall not be more than the longest period fixed by law for which the crime is punishable of which the offender is convicted.

Sec. 2190. 1. Where a person is convicted of two or more offenses before sentence has been pronounced upon him for either offense, the imprisonment to

which he is sentenced upon the second or other subsequent conviction, must commence at the termination of the first or other prior term or terms of imprisonment, to which he is sentenced.

New York Code of Criminal Procedure

Sec. 8. *Rights of defendant in a criminal action.*

In a criminal action the defendant is entitled

1. To a speedy and public trial;

2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel;

Sec. 308. *Defendant appearing for arraignment without counsel to be informed of his right to counsel.*

If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel,

Sec. 485. *The judgment-roll.*

When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had; and must, upon the service upon him of notice of appeal, immediately annex together and file the following papers, which constitute the judgment-roll:

* * * * * * *

2. The indictment and a copy of the minutes of the plea or demurrer; . . .

New York Judiciary Law

Sec. 292. The original stenographic notes, taken by a stenographer, are part of the proceedings in the cause.

Supreme Court of the United States

October Term, 1946.

No. 405.

MARVIN GAYES,

Petitioner,

vs.

THE STATE OF NEW YORK.

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK.

RESPONDENTS' BRIEF.

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RESPONDENTS' BRIEF.

Opinion Below.

The petitioner proceeded by motion, *coram nobis,* in the County Court, Monroe County, New York, for an order vacating and setting aside a judgment of conviction rendered against him, dated July 28, 1938. The application and motion of the petitioner was predicated upon the contention that at the time of the petitioner's arraignment on July 15, 1938, when his plea of "guilty" was entered, he "was not informed of his Constitutional rights of assistance of counsel (fol. 33)," and, further, it was the claim of the petitioner that "the record is silent as to whether the petitioner was informed by the Court that he was entitled to the assistance of counsel, or that he was informed of the statutory provision set forth in the Code of Criminal Procedure, N. Y. S., Sections 8, subdivision 2; 188 and 308, and that his

rights are protected under Article I, Section 6, N. Y. S. Constitution (fol. 34)." The motion was further predicated upon the petitioner's claim that he had not intelligently and competently waived his rights or intelligently and competently understood his rights to assistance of counsel (fols. 33-37).

The motion was denied by an order made June 14, 1946 (O'Connor, C. J.) unaccompanied by any opinion (fol. 44).

Jurisdiction.

The order of June 14, 1946, denying petitioner's motion to vacate and set aside the judgment of conviction, dated July 28, 1938, was not appealed from. The Court of Appeals of the State of New York has held that such an order is not appealable (*People vs. Gersewitz*, 294 N. Y. 163). The jurisdiction of this Court is, therefore, sought to be invoked on the ground that the order of the Monroe County Court, being under New York practice not appealable, constitutes the Monroe County Court the highest Court of New York State in a *coram nobis* proceeding in which a decision could be had for the purposes of this application. The respondent intends to demonstrate in this brief that jurisdiction does not exist as contended by the petitioner because (1) on all of the facts, no question of due process of law is presented to this Court, and (2) the petitioner has failed to exhaust his remedies in the State Courts, and for this reason has not proceeded to the highest Court in which a decision could be had relative to the conviction herein being attacked by the petitioner.

Questions Presented.

The petitioner raises the following questions (petitioner's brief, page 2):

1. Whether a claim of right under the Fourteenth Amendment to the Constitution of the United States was necessarily determined and denied by the order of the County Court.

2. Whether upon the facts alleged and upon those conceded the petitioner was entitled by the Fourteenth Amendment to the Constitution of the United States to have counsel assigned for his assistance before his plea of guilty was accepted by the Court.

3. Whether upon the facts alleged and upon those conceded the petitioner's right to an assignment of counsel was intelligently and competently waived.

Constitutional and Statutory Provisions Involved.

The relevant provisions of the Constitution of the United States and of the Constitution and statutes of the State of New York are set forth in the Appendix, *infra*, pp. 23-26.

Statement.

On July 13, 1938, the petitioner was indicted, together with one Francis Smith, for the crimes of Burglary, Third Degree and Petit Larceny. The indictment charged that the two defendants, acting in concert, on or about June 11, 1938, at the Town of Rush, in the County of Monroe, New York, feloniously broke and entered the building and garage of one Francis Marlow, doing business under the name and style of Pontiac Garage, with intent to commit therein the crime of larceny (fol. 1).

It appears, not only from the Record of Conviction, but from the minutes of the stenographer present in Court, that the petitioner, Marvin Gayes, was brought into Court for arraignment on or about the 15th day of July, 1938 (fol. 3)

over a month after the commission of the alleged crime, and it appears from the stenographer's minutes that the indictment was read by one Clarence J. Henry, Esq., one of the Assistant District Attorneys of the County of Monroe, to the defendant, and in plain terms stated to the defendant that he was accused of the crime of Burglary in the Third Degree in that he was charged with having broken and entered the building and garage of Francis Marlow with the intent to commit the crime of larceny therein, and was notified, further, that there was a second count in the indictment which accused this petitioner of the crime of Petit Larceny, in that he stole certain articles of currency from the premises at that time. It then appears that the Assistant District Attorney, Mr. Henry, after reading the substance of the indictment to the petitioner, stated to him, "Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment?" It then appears that the petitioner, Gayes, answered, "No, sir." The petitioner was then asked, "What is your plea?" to which the petitioner answered, "Guilty." Then the petitioner was asked whether he had received any promise from the District Attorney or any member of his staff as to what disposition would be made of his matter, to which the petitioner answered, "No, sir."

It then appears that the sentence was postponed to July 25, 1938, at which time the Court further adjourned sentence to July 28, 1938. On July 28, 1938, the defendant was asked whether he had any legal cause to show why the judgment of the Court should not then be imposed upon him, and the petitioner answered in the negative, whereupon the Court sentenced the petitioner to be committed to the New York State Vocational School at West Coxsackie, New York.

It must be borne in mind that the time between the entry of the plea of guilty and the time of sentence is a period

during which Court investigation is carried on by the Probation Office attached to the County Court, so that the Court may properly be apprised of the background and history of the defendant. It is important to note that in the statement of the defendant attached to this record, on page 4 of the transcript, that the petitioner had stated that his residence was the S. P. C. C., or Society for the Prevention of Cruelty to Children, located at Rush, New York; that he was sixteen years of age on September 18, 1937, and that he had received two years of High School education; that he had a previous Court record dating back to January 14, 1938, which was to the effect that he had been convicted at Toronto, Canada, of the crime of Burglary in the Third Degree and that he had been given a six months' sentence, and reference was made to being deported. A reference appears in the statement made by the defendant that he had waived his right to an attorney.

Petitioner, in his moving papers before Judge O'Connor, alleges that at the time of his arraignment and plea that he was sixteen years of age, and could not have understood his rights to counsel, and that when asked if he "desired counsel, and answered "No" thought that he would be forced to pay the lawyer in the event of conviction or acquittal, and that having no funds or relatives, who could come immediately to his assistance, he plead guilty to the indictment.

It appears further from the transcript of the record before this Court that Gayes, subsequent to being released from the New York State Vocational Institution at West Coxsackie, was charged in the County of Schenectady, New York, on October 15, 1941 (fol. 40), with having, with two others, committed the crime of Burglary in the Third Degree, in that he, together with two others, broke and en-

tered a building known as Scottie's Radio Service, with intent to commit therein the crime of larceny. The record discloses that Gayes was *duly* arraigned and was thereafter convicted upon a plea of guilty and sentenced as a previous felony offender to a term of ten to twenty years in Clinton Prison at Dannemora, New York. The respondents urge that with respect to the date of arraignment and plea, as well as the date of sentence, a strong presumption or regularity exists and that the Trial Court performed its duty in the premises and that the petitioner was sufficiently advised of such rights as he was entitled to enjoy in this regard.

Argument.

I

It is the contention of the respondents that a Criminal Court is empowered to set aside one of its own judgments in *coram nobis* proceedings *only* where the judgment was procured by fraud or in violation of a Constitutional right and under circumstances making it impossible for the defendant to avail himself of the ordinary remedies which are afforded him by the provisions of the Code of Criminal Procedure and the Constitutions of the State of New York and United States. It is respondents' contention, further, that where a Writ of Error *Coram Nobis* is sued out, not only must it be alleged, but it must be proved that the judgment was obtained through fraud, misrepresentation or any violation of the defendant's Constitutional rights and that, further, it must be alleged and proved that it was through no fault of the defendant that his alleged grievances were not presented to the Trial or Appellate Courts through a means regularly provided by the Code of Criminal Procedure. The New York Courts, as well as the Courts of the

United States have recognized the power of Criminal Courts of original jurisdiction to entertain a motion in the nature of a Writ of Error *Coram Nobis* only upon a showing that the petitioner was the victim either of fraud, misrepresentation, or of a violation of his Constitutional rights, and it has been indicated that the power of the Courts to entertain such motions can have no broader scope.

(*People vs. Gersewitz*, (1945) 294 N. Y. 163, 167;
Matter of Hogan vs. Supreme Court, (1946) 295 N. Y. 92;
Matter of Lyons vs. Goldstein, (1943) 290 N. Y. 19).

In the case of *People vs. Gersewitz, supra*, Judge Lehman stated:

> "We have sanctioned the exercise of such a power by a Court to * * * set aside an order or judgment which was induced by fraud or procured in violation of a Constitutional right of a party. Perhaps that power can have no broader scope."

Upon a consideration of the authorities, it would seem to be the law that in order for a defendant to come properly before the Court, he must show that his petition for a Writ of Error *Coram Nobis* must be founded on some fact which was unknown to the petitioner at the time of his conviction and which the exercise of reasonable dilligence would not then have disclosed, or which the petitioner was then, in some way, prevented from bringing to the attention of the Court.

(*Sanders vs. The State*, 85 Indiana, 318).

In the recent case of *Commonwealth vs. Harris*, 351 Pa. 325, 329, the Court stated:

> "Where a party seeks to avail himself of the remedy of a Writ of Error *Coram Nobis*, he must show that *it was by no fault or negligence of his* that the error in fact assigned was not made to appear at the *former trial*." (Italics our own.)

In line with that case, there is in the State of New York the decision of the Fourth Department of the Appellate Division of the Supreme Court (*People ex rel. Kennedy vs. Hunt*, 257 A. D. 1039) a statement to the effect that where the defendant has entered a plea of guilty at a time when he is not represented by counsel that the defect, if there be one, would be cured when the prisoner, represented by counsel, failed to raise the question when the sentence complained of was imposed upon him. The Court in that case very definitely indicates that the policy of a defendant in permitting a matter to go to judgment without raising the question of any possible violation of his rights, will not be allowed, so that on a future occasion, at the time and election of the prisoner, he may then choose to raise the question that he was not properly advised. It necessarily follows that if that were permitted, defendants sentenced to long terms of imprisonments, would wait for a substantial period of time to transpire and then, at their election, come forward with an ingenious statement without any other backing except the *defendant's statement alone* to the effect that he did not know of his rights and that his matter should be brought before the Court and his plea set aside and that he should be placed in status quo, knowing full well at that time that witnesses might not be available to try the particular case. He would also know full well that their memories would not be as certain on the subsequent date of trial; that naturally the testimony of a witness would be open to cross-examination and attack upon matters which, when fresh in memory, could easily be stated, but which, on subsequent dates, naturally would not be apparent long after the date of the occurrence of the transaction upon which the action is predicated.

It would seem from a reading of the authorities stated by the petitioner in the instant case, as well as the informa-

tion set forth in his moving papers, that the petitioner has had the benefit and advice of persons in prison with him who have made a very serious study of the decisions of the Courts and that the statements appearing in petitioner's papers, when analyzed, together with the statement of the Court, would seem to indicate that the petitioner and his advisers, prior to initiating the proceeding herein in Monroe County Court, had made an exhaustive study with the thought of placing the petitioner, if possible, in a position where his case would be synonymous with the decisions referred to. Not for one moment is it the intention of the respondent to say that because of that situation any possible violation of the defendant's rights is justified. Nevertheless, from the petitions which have been filed recently, a situation has been presented which the respondents believe should be called to the Court's attention, with the thought that these applications will receive a great deal of analysis in determining the justification and sincerity of the petitions presented.

It definitely is indicated by the discussion of counsel, as well as the matters set forth in the moving papers, that there is no intimation of any fraud or misrepresentation having been employed upon this petitioner; further, it must be shown in order to properly exercise the right to relief under a Writ of Error *Coram Nobis* that there was a violation of the Constitutional rights of the defendant within the meaning of the Fourteenth Amendment to the Constitution of the United States or the provisions of the Constitution of the State of New York, Article 1, Section 6, and the provisions of Section 308 of the Code of Criminal Procedure of the State of New York, which relate specifically to the proceedings which take place at the time of the arraignment of a defendant upon an indictment.

We have properly evaluated the situation, we submit, as regards any possible right to relief, predicated upon any question of fraud or misrepresentation, and it is the purpose of the respondents, further, to indicate to this Court the attitude that the respondents assume in regard to the remaining problems presented and which were considered by the Monroe County Court at the time that the Writ of Error *Coram Nobis* was before the Court.

II

Section 308 of the Code of Criminal Procedure provides that if the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does, the Court must assign counsel. In the instant case, Gayes did appear before the County Court on his arraignment on the 15th day of July, 1938 without counsel. The Assistant District Attorney, in the presence of the Court, after notifying the petitioner of the contents of the indictment, the specific charge against him, *in what we contend was understandable language to a youth of sixteen*, asked the petitioner if he needed a lawyer before entering a plea of guilty or not guilty to the indictment.

These words, we submit, which were used, indicated to the defendant that if he needed a lawyer, he could only assume that he was entitled to one, if he expressed the desire to have one. Further, these very facts, circumstances and words all add up to the proposition that in the light of the entire picture, this defendant, upon being asked whether he needed a lawyer before entering his plea, could very well assume that if he did express a need, that a lawyer would be furnished for him. Here it appears that when the petitioner was asked if he needed a lawyer, he made no statement to the effect that he didn't have funds

to hire a lawyer. He said nothing to the effect that he had no friends or relatives to whom he might turn. He did not ask if he might get in touch with any possible friends or relatives. He did not indicate that he was without funds to get a lawyer, although it might very well be assumed from the fact that, as it appears, he was living in a place provided for him by the Society for Prevention of Cruelty to Children (fol. 4), he was not possessed of funds, in all fairness to this petitioner.

Nevertheless, the real question which arose at the time was whether he actually felt the need of an attorney to advise him as to whether he should plead guilty or not guilty to the indictment. Is it not fair to assume from the facts and circumstances as they appeared on that occasion of his plea, that if had the requisite money to hire a lawyer, or to at least try to hire one, that he felt at the time, from his statement, that he did not need a lawyer? If he had no need, certainly, even though possessed of funds, he would not have hired one, if within his pecuniary power to do so, feeling and believing at the time that he did not need a lawyer for the purpose of pleading guilty or not guilty to the indictment in question.

The Laws of the State of New York, as they existed in 1938, at the time of the commission of the crime with which Gayes was charged, and at the time of his arraignment and conviction, did not provide for treatment of a sixteen year old person as a Youthful Offender as it does today. I very completely sympathize with the view point taken by Mr. Wechsler in his argument to this Court as concerns what would probably have happened today in reference to the treatment of Gayes. However, even today, as in 1938, a very serious amount of consideration would have been given to the fact that Gayes had been

previously convicted of an act of Burglary, Third Degree, approximately six months prior to the conviction here contested. The benefits of the "Youthful Offender Law" are intended primarily for first offenders and not for recidivists.

It must be borne in mind that in the January just prior to this conviction of July 28, 1938, this defendant was convicted of an offense, which he stated at the time of his plea of guilty, was an equivalent charge, one with which he had had some previous experience. Your respondents cannot agree with the petitioner's argument that the words, "breaking and entering" have such an unusual and technical meaning as has been suggested. The petitioner did not in any way indicate at the time of his arraignment, with his background of experience with a similar charge having been proven against him, that he was in doubt as to what was meant by the phraseology used in the statement of the charge upon which he was arraigned. It must be borne in mind that this young man, with a second year in High School education, would have within the limits of his vocabulary the use of any of the phraseology mentioned in the indictment and an understanding of the implication of the various words and phrases therein used. True, it is, that some of these words may be technically used and construed, but, there is nothing in the actions of the petitioner at the time of his arraignment which indicated that there was in his mind any question as to just what the words "breaking and entering with intent to commit the crime of larceny" meant. It would be assumed that these words had their ordinary and usual meaning to him and were so understood, and it is submitted that if that is the fact, then the defendant definitely understood the nature of the charge against him and was

in a position then to know whether he actually needed the advice of a lawyer or not.

Furthermore, it appears from the record before this Court that sentence was not imposed upon this petitioner at the time of his arraignment and plea. If anything, the facts indicate that it was a period of at least some thirteen days afterwards that sentence was imposed. It must be assumed from those facts that the Court, in compliance with the provisions of Section 482 of the Code of Criminal Procedure, had, in the interim, caused an investigation of the petitioner's background to be made, which would naturally take into consideration a measurement of the petitioner's mental abilities, what his education had been, what his background had been, what his knowledge and understanding of things would be, and an investigation certainly, of the facts surrounding the petitioner's participation in the crime to which he had plead guilty. The Court, naturally, must have had before him the facts indicating that this petitioner knew what he was doing when he plead guilty, for, it is submitted, that the Court, in the performance of his duty, which he is presumed to have been doing regularly, would otherwise have seen fit to indicate that the petitioner's plea of guilty should have been set aside on the ground that he did not know, first of all, what his rights were because of lack of understanding and immaturity; furthermore, that if the investigation indicated that the petitioner was not guilty of the charge, the Court, on that ground, would have set aside the plea of guilty and obligated the prosecution to proceed with the trial of the petitioner.

From the decision of this Court in *Johnson vs. Zerbst*, 304 U. S. 458, as well as *The People of the State of New York vs. Frank Canizio*, 327 U. S. 82, it is assumed that

the Court, in the instant case, will decide this case upon the peculiar facts of the instant case. It is, therefore, the respondents' belief, predicated upon the facts of this particular case, that the Court at the time of accepting the plea of guilty, and also at the time of pronouncing sentence upon the petitioner, had sufficiently advised this petitioner in accordance with the provisions of law.

While *we agree* that the exact language of Section 308 was not used at the time of the arraignment of this petitioner, nevertheless, he, at that time, had the right to determine whether or not he wanted an attorney to advise with him. There is no law of the State or of this land which forces a defendant to have counsel if he does not want counsel. He has a right to determine whether he shall be represented by counsel or not. He may, under the Laws of this State and land, proceed to trial without having a lawyer and defend in person. When this petitioner stated that he did not feel that he needed a lawyer before entering his plea, he was exercising his Constitutional right to defend in person. The fact that he was entering his plea of his own free will and choice is fortified by the statement that the defendant had made that he had not received any promises from the District Attorney or any member of his staff as to what disposition would be made of his case. This fact strengthens the argument that the petitioner was entering his plea unequivocally with no thought that he was other than guilty of the charge which had been read to him and which he indicated at the time was understood by him, and that he, therefore, wished to throw himself on the mercy of the Court who, after a very appreciable time, sentenced him, not to a State's prison, but to a Correctional Institution, where he would receive training and be rehabilitated so that he could

become a contributing member of society, rather than continue his manners and ways of anti-social being.

That he was not kept at the Correctional Institution for any extended period of time appears quite definitely from the record that the defendant was sent to Clinton Prison from Schenectady County on the 15th day of October, 1941, so that it must be presumed that he had been released from confinement in the Correctional Institution of New York State at West Coxsackie, N. Y. prior to that particular time.

III

In 1941, at the time this defendant-petitioner was before the County Court in Schenectady County upon a similar charge of Burglary in the Third Degree, it appears from the record of conviction (fol. 41) that the defendant at that time of being sentenced as a previous felony offender, based upon his previous conviction in Monroe County, was asked whether he had any legal cause to show why judgment should not then be pronounced against him, and it does not appear in any of the papers advanced by the petitioner that he at that time, three years after his previous conviction raised any question, even though it may be assumed that he then could have raised any question as to the legality of his conviction in Monroe County in July of 1938. This is proven by the fact that the statement appears in the Record of Conviction that no legal cause and no sufficient cause was alleged or appeared to the Court before the judgment sentencing Marvin Gayes to confinement in Clinton Prison was imposed. It is a fact, however, that Gayes, at that time, could have raised the question of any possible attack he wished to make upon the previous conviction.

He could have taken his matter to the Supreme Court of the State of New York, to the Appellate Division of that Court, and with consent, if denied relief to which he felt he was justly entitled, could have taken his matter to the Court of Appeals of the State of New York. There is no showing here that any such endeavors were made, and it must be assumed that the petitioner at that time, with whatever facilities were afforded him, did not see fit to make the statement that he now makes—that he did not understand his right to counsel as guaranteed to him under the Laws of the State of New York.

While it is true that what happened in 1941 in Schenectady County does not defend what happened in Monroe County in 1938, nevertheless, it would seem that if the petitioner felt that his rights had been abridged in 1938, that he would, with the experience that he necessarily had gone through during the three years which elapsed between the time of his conviction in Monroe County and his conviction in Schenectady County, have learned sufficiently through the experiences which prisoners in Correctional and Penal Institutions have, the requisite information so that in 1941, either through counsel, or otherwise, he would have objected to his being punished as a second felony offender.

It is of great importance in considering this matter for this Court to examine the letter addressed to Judge O'Connor at folio 18. It must be borne in mind that since 1941 this petitioner has been in prison continuously, it would appear, at Dannemora. The information and the make-up of the communication does not represent the intellectual attainment of a person ordinarily deprived of an education or understanding. As a matter of fact, the communication indicates quite the contrary, that the petitioner, Marvin Gayes, at the time of writing the letter in question, dated May 19, 1946, either had the advice of some one versed in

law, or had possessed himself of a high degree of knowledge concerning legal matters. The Court will note, I assume, the particular reference to the fact that no one of the age of seventeen years could competently (fols. 20-21) and intelligently waive any Constitutional right, as appears in that letter of May 19, 1946, and the petition filed May 16, 1946, referring to the inability of a sixteen year old to understand the right to counsel (fol. 34).

IV.

The contention that the Fourteenth Amendment to the Constitution of the United States was violated, in that counsel was not assigned to this defendant, is not a valid argument under the facts of this particular case. As has been said before, as stated in Johnson vs. Zerbst, *supra,*

> "The determination as to whether there has been an intelligent waiver to the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

As has been previously stated, the petitioner was advised of the nature of the charge against him. He was asked if he needed counsel before entering his plea of guilty or not guilty, to which he unequivocally answered, "No". It is your respondents' contention that these circumstances demonstrate definitely that the defendant was substantially apprised of his right to counsel when he was asked if he needed counsel. Upon his unequivocal answer that he did not need counsel, taking into consideration his background of having been previously convicted, the fact, as appears from the Minutes of the Clerk taken at the time of his conviction that he was given a sentence of six months, and a further notation and reference to deportation from Toronto, Canada, those circumstances indicate that this petitioner at the time was a young man who was possessed of a degree of sophistication beyond that of the ordinary

young man to be found in his particular lot and, furthermore, that he was possessed of an educational background together with that experience which certainly indicated that he had the ability to take care of his own interests at the time of the consideration of the narrow issue of his guilt or innocence of the charge against him. As was stated in the case of *Betts vs. Brady*, 316 U. S. 455, 472, he was not wholly unfamiliar with criminal procedure. If he had asked for counsel and been denied counsel, it stands to reason that his conviction would have been readily reversed. However, in this case, we have at the present time only the petitioner's own statement that he did not understand the right to counsel, as it was explained to him at the time of his arraignment. It must be borne in mind that at no time during the several years which followed his conviction in 1938 until 1946 when the motion was made to Monroe County Court to vacate his judgment of conviction did the petitioner in any way evidence that he was ignorant of his right to counsel or without funds or without friends or family. It does not appear that when he was before the Court in Schenectady at the time of his being sentenced on the Burglary charge there, which sentence he is presently serving, that he in any way indicated any of the facts now related. If he enjoyed counsel at the time of his conviction in 1941 in Schenectady, there is no indication that his counsel, if any, or the petitioner at any time, raised any question indicating any of the items of his present claim in reference to his conviction which took place in 1938 in Monroe County Court. It is your respondents' opinion that the petitioner *waived* his right to counsel on the day of his arraignment in the Monroe County Court. Whether or not a person is possessed of the requisite intellectual ability to make the determination and enter the plea which the petitioner did, was a question of fact which presented itself to the Court at the time of the petitioner's plea. The fact that such plea

was accepted by the Judge presiding in the Monroe County Court at the time of the petitioner's plea, by the presumption of regularity, indicated that the Judge in the performance of his duties believed, from all of the facts and circumstances, that the petitioner had the requisite ability to understand that when he was asked if he needed counsel, that it impliedly indicated that he was entitled to have counsel. Otherwise, there would have been no reason for asking him if he needed counsel. That the defendant answered in the negative met the test set forth in the Johnson vs. Zerbst case, *supra*, which said that an intelligent waiver of the right to counsel must depend in each case upon the particular facts and circumstances surrounding that case, including the *background*, the *experience* and conduct of the accused.

The petitioner has taken a line of reasoning which practically amounts to an assertion that a sixteen or seventeen year old person, even though apprised of his right to counsel by the Court, or that he is entitled to the aid of counsel, cannot waive that right, and indicates that there is an immaturity of judgment attached to sixteen and seventeen year olds which would vitiate any plea entered by such a person unless accompanied by counsel, advising him at the time.

In view of the fact that through the years there have been a great many convictions prior to the enactment of the so-called "Youthful Offender Law" in the State of New York, that question may be asserted almost endlessly. It, therefore, occupies a position of great importance, your respondents sincerely believe. The Constitution of the State of New York provides, Article 1, Section 6, that the party accused shall be allowed to appear and *defend in person*, and with counsel, as in civil actions. In New York State, a person over the age of sixteen years is subject to prosecu-

tion upon a charge of crime. If we are to take the position asserted by the petitioner, it would seem to be counter to the statement which appears in the Constitution of the State of New York which permits persons charged with felony which is one of the divisions of crime, to appear and defend in person. We submit that the position asserted by the petitioner would then be and is in effect a request for a determination which would be contra to the provisions of the Fourteenth Amendment, in that there would be a deprivation of life or liberty without due process of law. Under the law as it stands today in New York State, under the Constitution of the State and the statutes enacted pursuant thereto, a defendant sixteen or seventeen years old may defend in person. It may well be that this provision of the Constitution should be amended to require Courts to assign counsel to all defendants unable to pay for legal services where the defendants are of immature age. As a matter of fact, and I hope it is proper to make the statement at this time, the District Attorney of the County of Monroe, has taken the position that in every case where a defendant is between the age of sixteen and twenty-one years of age, no plea of guilty will be taken from a defendant without the defendant's having first had the benefit of counsel. That is the present method which is pursued in this particular county with reference to youths between the ages of sixteen and twenty-one. An interesting situation might develop where some defendant at some time or other may choose to say that he will not provide himself with counsel, whether financially able to do so or through the Court's assigning counsel to him. It may be that a defendant may choose to go to trial and say, "I am going to defend in person." If we are to accept the theory advanced by the petitioner that no person sixteen or seventeen years of age is intellectually capable of waiving counsel or understanding, even when apprised of his rights, just exactly what those rights

are, then may it not be foreseen that at some future time, if such interpretation were to be adopted, that in an instance hypothetically referred to as above, a person sixteen or seventeen who refuses counsel and who goes to trial, may still be heard to say, in the event of his conviction, that he did not intelligently and competently waive his right to counsel, even though the act of refusal of counsel were one of his own.

As regards the stipulation regarding the minutes of the stenographer, which are made part of the record before this Court, your respondents would like to call this Court's attention to the fact that at the time this matter was originally submitted to Judge O'Connor, it was not known that these minutes were in existence. The stenographer who had ordinarily taken the Court's minutes before Judge William C. Kohlmetz, who presided in the Monroe County Court at the time of the petitioner's arraignment on July 15, 1938, had died, and it was assumed that because of that fact, and as well as the fact that the Minutes of the Court are not required to be kept after two years, that the Minutes could not be had and were not available. When the fact became known to your respondents that they were in existence, your respondents immediately notified counsel assigned by this Court to the petitioner and entered into a stipulation so that the actual Minutes of the Arraignment of this petitioner could be made available for this Court's consideration.

In Conclusion.

We respectfully submit:

1. That no federal question is raised by the contentions of the petitioner in the case presented to this Court, and that it is our thought that the petitioner was granted due process of law in conformity with the provisions of the

Fourteenth Amendment, in that the provisions of the New York State Constitution, Article 1, Section 6, were met by the petitioner's being advised of the nature and cause of the accusations against him, and being asked as to whether he needed the aid of counsel, thereby complying with the provisions of Section 308, which specify that upon arraignment without counsel, he must be asked if he desire the aid of counsel, did reply in the negative, thereby obviating any requirement that the Court assign counsel to him.

2. That it does not appear that the petitioner exhausted his remedies in New York State, and that upon the sentence which he is now serving there was no appeal taken from it to the highest Court of the State in which a decision could be had.

3. That the presumption of regularity in the proceedings at the time of the plea of guilty and conviction in the Monroe County Court has not been overcome.

4. That the petitioner, though sixteen years of age at the time, did intelligently and competently waive his right to counsel.

V

FOR THE FOREGOING REASONS, WE RESPECTFULLY SUBMIT THAT THE JUDGMENT OF THE COUNTY COURT OF MONROE COUNTY SHOULD BE AFFIRMED AND THE PROCEEDINGS HEREIN DISMISSED.

DANIEL J. O'MARA,
District Attorney,
Monroe County.

HARRY L. ROSENTHAL,
Assistant District Attorney,
Of Counsel.

Appendix.

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of New York, Article One, Section 6:

> No person shall be held to answer for a capital or otherwise infamous crime * * * unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No persons shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself * * *

No person shall be deprived of life, liberty or property without due process of law.

New York Code of Criminal Procedure

> Sec. 308. *Defendant appearing for arraignment without counsel to be informed of his right to counsel.* If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. * * *
>
> Sec. 480. *Arraignment of defendant for judgment.* When the defendant appears for judgment, he must be asked by the clerk whether he have any legal cause to show, why judgment should not be pronounced against him.

Sec. 481. *What cause may be shown against the judgment.*

He may show for cause, against the judgment,

1. That he is insane; and if, in the opinion of the court, there be reasonable ground for believing him to be insane, the question of his insanity must be tried as provided by this Code. If, upon the trial of that question, it is found that he is sane, judgment must be pronounced; but if found insane, he must be committed to the state lunatic asylum until he becomes sane; and when notice is given of that fact, he must be brought before the court for judgment;

2. That he has good cause to offer, either in arrest of judgment, or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.

Sec. 482. *If no sufficient cause shown, judgment to be pronounced.*

If no sufficient cause appear to the court why judgment should not be pronounced, it must thereupon be rendered. Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physicial examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

Sec. 485-a. *Examination of convict before sentence.*

It shall be the duty of the court in which any person shall be convicted of an offense punishable in a state prison, before passing the sentence therefor, to ascertain by the examination of such convict on oath, and in addition to such oath, by such other evidence as can be obtained, whether such convict had learned and practiced any mechanical trade, and in like manner such other facts tending to indicate the causes of the criminal character or conduct of such convict, as to the court shall seem proper and desirable, and the court shall direct the clerk of the court to enter such of the facts so ascertained, and such other facts as to the court shall seem proper and desirable, upon the minutes of

the court, and said clerk shall include a copy thereof in the certified copy of the sentence of such convict which shall be delivered to the sheriff of the county in which such conviction shall be had.

Sec. 517. *In what cases appeal may be taken by defendant.*

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals, and upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred and eighty-five, may be reviewed. For every purpose of an appeal herein, a conviction shall be deemed a final judgment, although sentence has been or may hereafter be suspended by the court in which the trial was had, or otherwise suspended or stayed, and the supreme court upon such an appeal may review all decisions of the court upon a motion for a new trial, or in arrest of judgment. A judgment of affirmance upon any such appeal shall not operate to exclude any appellant, otherwise entitled thereto, from the right of suffrage.

Sec. 520. *Appeal, a matter of right; one appeal; how taken.*

1. • • •

2. Elsewhere than in the City of New York, such appeals shall be taken as follows: From a conviction by a court of special sessions, police court, police magistrate, or justice of the peace to the county court of the county in which the conviction was had; from a conviction by a county court or in the supreme court except where the penalty is death, to the appellate division of the supreme court of the department in which the conviction was had; from a conviction by a county court or by the supreme court, where the penalty is death, to the court of appeals.

3. Where an appeal has been taken and has been decided by any of the appellate tribunals hereinabove referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not otherwise. If a judge of the court of appeals or a

justice of the appellate division of the supreme court of the department in which such conviction was had certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a f her appeal on such question of law may be taken to the court of appeals.

4. • • •

Sec. 931. *Investigation.*

Probation officers when directed by the court shall fully investigate and report to the court in writing on the circumstances of the offense, criminal record and social history of a defendant, and in the case of a child in children's court the circumstances responsible for the child's appearance in court and his social history. Whenever desirable and facilities exist therefor, they shall also obtain a physical, mental and psychiatric examination of such defendant or such child and report thereon in like manner to the court prior to sentence or adjudication. Such investigations and reports shall be made promptly. The court shall have such information before it prior to sentence or adjudication. When an offender is committed or sentenced to a correctional institution for adults for a period longer than three months, or when a child is committed or placed in an institution either for delinquent or neglected children, a copy of the probation officer's investigation shall be sent by the court to the warden, superintendent or director of the institution. When an offender is committed or sentenced to a correctional institution under the supervision of the state department of correction, an additional copy of the probation officer's investigation report shall be forwarded to the state commissioner of correction.

New York Judiciary Law.

Sec. 297. *Preservation of original notes for two years when not filed with clerk.*

Uuless the original stenographic notes taken upon a trial or hearing, are filed, pursuant to an order, made as prescribed in section thirteen of this chapter, they must be carefully preserved by the stenographer, for two years after the trial or hearing; at the expiration of which time he may destroy the same. Formerly § 298, renumbered 297 and amended L. 1945, C. 649, § 148, eff. April 9, 1945.

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1946.

Marvin Gayes, Petitioner, v. The State of New York. | On Writ of Certiorari to the County Court of Monroe County, State of New York.

[June 23, 1947.]

Mr. Justice Frankfurter announced the judgment of the Court in an opinion in which The Chief Justice, Mr. Justice Reed and Mr. Justice Jackson join.

This is another case in which release is sought from confinement under a sentence by a State court following a plea of guilty, on a claim of a denial of due process of law through want of benefit of counsel.

The circumstances are these. On July 15, 1938, Gayes, then a lad of sixteen, was arraigned in the County Court of Monroe County, New York, upon an indictment charging burglary in the third degree and petty larceny. According to the record of conviction, he was asked, in accordance with the requirement of § 308 of the New York Code of Criminal Procedure, whether "he desired the aid of counsel," and he answered "No."[1] Imposition of sen-

[1] Subsequent to the proceedings before the County Court of Monroe now under review, the minutes of the original proceedings against Gayes came to light. By stipulation of counsel these minutes are here. According to them, the precise question put to Gayes by the Assistant District Attorney in the presence of the Judge was, "Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment?" To which Gayes replied, "No, sir." It may be inconclusively debated whether if Gayes was asked "if he desired the aid of counsel," as stated in the entry in the record of conviction, he was better informed of his rights, than if he was asked, "Do you need a lawyer?" In view of our disposition, the difference in significance becomes immaterial, and it is also immaterial whether, if there were a difference, we could consider, even in a case involving belated release from State detention, a matter not before the court whose judgment is

tence was postponed to July 28. When on that day Gayes appeared for judgment, he was asked, again according to the requirements of New York law, whether "he had any legal cause to show why judgment should not be pronounced against him." New York Code of Criminal Procedure § 480. And "no sufficient cause appearing," the record continues, Gayes was committed to a New York State Vocational School to be dealt with there according to law. It appears from the facts before us that Gayes did not stay at this correctional institution as long as New York law would have authorized his detention. See New York Penal Law §§ 2184–a and 2189, in connection with § 407. For, on October 14, 1941, he pleaded guilty, in the County Court of Schenectady, New York, to a new charge of burglary in the third degree. The record of this latter proceeding does not indicate whether this time he was or was not represented by counsel. But no claim is made that this plea of guilty, or the sentence under it, has any infirmity for lack of legal assistance. Gayes' claim is that he was sentenced as a second offender by the inclusion of the improper sentence to the vocational school in 1938.

In accordance with New York procedure, Gayes, *pro se*, filed in the County Court of Monroe County, New York, an application to vacate the judgment rendered against him in that court on July 28, 1938. He claimed that in the proceedings which led to that judgment he had not been informed of his "Constitutional Rights of Assistance of Counsel," that he "could not have understood his rights to Counsel" and that "youths of the age of 16 years cannot Intelligently and Competently waive their rights."

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here for review. But the differences that may exist between formal entry in the minutes of an acceptance of a plea and what was actually said contemporaneously lends force to the caution frequently expressed that every intendment must be made in support of the due observance of law in the rendering of judgments which are collaterally attacked, often after a considerable passage of time.

Since, according to this claim, the first sentence was void, he challenged the validity of the sentence in 1941 because the length of the second sentence was partly based upon the 1938 conviction.

Upon this record, the county court denied the motion without opinion. As New York law then stood, no review could there be had of this determination. See *People* v. *Gersewitz*, 294 N. Y. 163. This made the county court the highest court of the State of New York for purposes of our review. *Canizio* v. *New York*, 327 U. S. 82, 85. But see Chapter 706 of the New York Laws of 1947. We brought the case here, 329 U. S. [redacted], as one of a series, for further consideration of the circumstances under which the requirements of due process imply a duty to supply counsel to defendants in State prosecutions.

The guiding principles bearing on the general problem have been set forth in the opinion in No. 540, *Foster and Payne* v. *Illinois*, just decided, *ante* p. —. Insofar as the facts of this case present a particular variant, they are controlled by our decision in *Canizio* v. *New York*, *supra*. We there held that whatever doubts may arise from the circumstances of a plea of guilty, if, before sentence is imposed, the opportunities required by the Constitution for meeting the legal implications of the plea are satisfied, the sentence must stand. And so, the questions that may be raised regarding the circumstances attending the imposition of Gayes' commitment to the vocational institution in 1938 are not now open. Gayes is complaining of his sentence following his plea of guilty in 1941.[2]

[2] Gayes is detained under the 1941 sentence imposed by the County Court of Schenectady. A motion attacking that sentence would, under New York law, have to be made in that court. What he is asking is the invalidation of the prior sentence, underlying as it were the Schenectady sentence, presumably as a first step in getting relief from detention under the latter sentence. We are treating this proceeding, for our purposes, as one seeking, in effect, relief from the 1941 sentence without regard to formal distinctions which might otherwise be relevant.

What he wants is to be relieved of his imprisonment under that sentence. That sentence, to be sure, partly took into account his earlier sentence in 1938. But upon his subsequent sentence, as a second offender, in 1941, he had full opportunity, so far as appears, to contest whatever infirmity he may have claimed in the earlier sentence when the fact of that sentence was included in the sentence which he is now serving.[3] Since the process leading up to the second sentence is not challenged he cannot now, so far as the United States Constitution is concerned, by a flank attack, challenge the sentence of 1938.

Judgment affirmed.

MR. JUSTICE BURTON concurs in the result.

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[3] According to the State, Gayes could have raised the claim he now makes against the 1938 conviction at the time he was sentenced in 1941, and from a denial of relief could have appealed to the higher courts. This was not contradicted by the petitioner and is not brought into question in any opinion of the higher courts of New York. It has been ruled in courts of very limited authority that a second offender cannot apply for resentence on a claim that there was a defect in the first sentence imposed by another court. See *People* v. *Keller*, 37 N. Y. Supp. 2d 61 (Gen. Sess. N. Y. County), and *People* v. *Paterno*, 182 Misc. 491 (Chatauqua County Court). Neither case, however, presented the claim that a violation of the United States Constitution vitiated the first sentence, and neither case raised the power of the court at the time of sentencing to consider such a claim. It is certainly within the power of a duly advised defendant, before pleading guilty as a second offender, to raise the constitutional invalidity of the first sentence so as to secure opportunity appropriately to challenge such invalidity. Nothing that is herein decided precludes petitioner from raising a denial of his constitutional right upon a record that discloses circumstances other than those before us. An order on such a motion is now reviewable by the New York Supreme Court and in certain instances by the New York Court of Appeals.

p. 5.

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1946.

Marvin Gayes, Petitioner, v. The State of New York. | On Writ of Certiorari to the County Court of Monroe County, State of New York.

[June 23, 1947.]

Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy concur, dissenting.

A sixteen-year-old boy, indigent and alone, without relatives, friends, money or counsel to aid him and, according to the undenied allegations of the petition, without knowledge of his constitutional rights,[1] pleaded guilty in 1938, under an indictment specifying two highly technical and distinct charges,[2] to the crime of burglary in the third degree.[3] The property he was charged with intending to steal[4] consisted of cigarettes of the value

[1] No answer was filed to the petition and the trial court determined the issues on the pleadings without hearing or appearance of petitioner in court, in person or by counsel. The allegation of petitioner that when asked whether he "desired counsel," he answered "no" in the belief that he would have to pay the lawyer's fee, and was not informed to the contrary is, of course, to be taken as true in the absence of denial and of contrary evidence which might have been tendered on a hearing.

[2] The first count charged that petitioner "broke and entered the building and garage of Francis Marolow . . . with intent to commit therein the crime of larceny"; the second count charged petit larceny of the property described in the text above.

[3] The sentence was to confinement in the New York State Vocational Institute, which when imposed for an unspecified term under New York Penal Law § 2184-a carried a maximum of ten years, which is the maximum for burglary in the third degree as a first offense. N. Y. Penal Law § 407 (3).

[4] Under the second count, for petit larceny or theft, being also presumably the property with respect to which it was charged in the first count that petitioner broke and entered with intent to commit larceny.

of seventy-five cents, two flashlights worth one dollar, and three dollars in currency. The sentence imposed on that plea has been served.[5] He is now confined as a second offender under sentence for another offense of similar character imposed in 1941,[6] when he was nineteen and also without relatives, friends or counsel so far as appears.[7]

One part of the opinion announced in this case, as I understand, takes the view that because Gayes did not attack the 1938 sentence in 1941, when he was sentenced as a second offender, he is forever foreclosed from doing so on the facts and issues presented on this record, although as a second offender he is now suffering the consequences of the 1938 sentence.[8] For this conclusion reliance is placed upon no New York authorities; indeed, as I read the state cases, the Court's decision is made in

[5] Petitioner was held under the first sentence, see note 3, until December 14, 1943, when the New York Board of Parole directed that service of the sentence as second offender begin. The date of termination of the latter sentence, see note 6, was correspondingly postponed.

[6] The sentence of ten to twenty years as second offender is mandatory. N. Y. Penal Law § 1941. Had petitioner been sentenced in 1941 as a first rather than a second offender, the maximum sentence allowed would have been five to ten years, N. Y. Penal Law §§ 2189, 407, and he might have been sent to a reformatory rather than prison. N. Y. Penal Law § 2185.

[7] The "Record of Conviction" in the trial for the second offense, contained in the record here, discloses that petitioner, having been charged and arraigned, first pleaded not guilty, then withdrew that plea and entered one of guilty. It is then recited that petitioner appeared for judgment and, "having been asked by the clerk whether he had any legal cause to show why judgment should not be pronounced against him, and no legal cause having been shown" or appearing to the court, judgment and sentence were thereupon pronounced. There is no recital that petitioner was represented by counsel, was informed of his rights in any manner, or admonished of the consequences of his plea.

[8] See notes 3, 5, 6 *supra*. See also note 12 *infra* and text.

the face of their rulings that the procedure petitioner has followed is the appropriate one for raising the issues he presents.[9]

I am unwilling to subscribe to such a doctrine of forfeitures concerning constitutional rights, which in the extreme circumstances of this case seems to me shocking.

Under all of the New York decisions which have passed upon the question,[10] the proper and apparently the necessary procedure, see *People* v. *Keller*, —Misc. —, 37 N. Y. S. 2d 61, 62, for attacking a sentence as second offender, upon the ground that the former conviction was invalid, is first by motion in the court imposing the initial sentence to vacate it, after which if the motion is successful the sentence for the second offense may be attacked and vacated.[11] In other words, the second offender, situated as is petitioner, must first overturn his first conviction in the court where it was obtained, before he can attack the second sentence founded in part upon that conviction.

This procedure in my opinion is a reasonable one within the power of a state to require, at least where both offenses

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[9] See note 11 *infra*.

[10] In the absence of determination by a state's highest tribunal the rule announced and applied by other state courts is to be taken by us as determining questions of state law. Cf. *West* v. *A. T. & T. Co.*, 311 U. S. 211.

[11] If the 1938 conviction is held void, under state law petitioner then may move to vacate the 1941 sentence in the court which imposed it, and for resentencing according to state law. See *People ex rel. Sloane* v. *Lawes*, 255 N. Y. 112; *People ex rel. Carolle* v. *Brophy*, 294 N. Y. 540; *People* v. *Keller*, — Misc. —, 37 N. Y. S. 2d 61. And the proper forum for attacking the 1938 conviction, as a preliminary to attack on that of 1941, is the one where the former was obtained, by the motion to vacate which petitioner has employed. *People* v. *Bernoff*, — Misc. —, 61 N. Y. S. 2d 46; *People* v. *Foster*, 182 Misc. 73; *People* v. *Paterno*, 187 Misc. 56, with which compare *People* v. *Paterno*, 182 Misc. 491; cf. *People* v. *Gersewitz*, 294 N. Y. 163, 167; *People* v. *Keller*, *supra*, at 63.

have taken place within its jurisdiction. And I know of no reason why this Court should disregard or override it. Much less is it within our province to invert the state procedure, if that is the effect of the dubious suggestion that petitioner's rights perhaps may be saved upon some other record "that discloses circumstances other than those before us," presumably if at all by motion before the court which imposed the 1941 sentence to vacate it.[12]

No state decisions are cited or, it would seem in view of the contrary authorities cited above,[13] can be cited to support such a view. Nor is it required by anything said or done in *Canizio* v. *New York*, 327 U. S. 82, if indeed such a matter could ever be within our function. The *Canizio* decision has no relevance to this case, either for prescribing the state procedure or for the constitutional issue. It held only that where a defendant had counsel at the time of his sentence and could then have moved to withdraw

[12] The opinion announced in conjunction with the Court's judgment seems to suggest that the decisions establishing the state procedure followed in this case are not controlling for our disposition, on what basis I am unable to understand, see note 10 *supra*, unless upon the untenable one that state rulings upon criminal procedures and the proper forum for utilizing them are not binding for federal determinations to the same extent as are such rulings in civil matters.

Only upon some such basis is the dubious suggestion justified that petitioner should have raised the question of the validity of his first sentence at the time of his sentencing as a second offender and in that forum. Not only is this contrary to the established state procedure, see note 11, but it is expressly qualified by the further suggestion that petitioner's rights may possibly be saved "upon a record that discloses circumstances other than those before us," and it seems to be contradicted by the further statement that "the questions that may be raised regarding the circumstances attending the imposition of Gayes' commitment . . . in 1938 are not now open." It is pertinent to inquired whether Gayes is to have another chance, through a local procedure prescribed by this Court alone, or whether the constitutional questions now presented are foreclosed by his failure to follow a procedure not prescribed or, so far as appears, permitted by the state.

[13] See note 11.

his prior plea of guilty, he was not prejudiced by the convicting court's previous failure to inform him of his right to counsel.

That case had nothing to do with the state procedure open to one convicted as a second offender for challenging his sentence on the ground that the first conviction was invalid for federal constitutional reasons. And the facts, on the merits, were very different from those presented here. Whereas, among other things, in that case the petitioner did have counsel before his sentence was imposed, here not only was Gayes denied counsel altogether in the first trial, but so far as the record discloses he had none in the trial for the second offense. I do not think the *Canizio* decision can be held to cover such a wholly different situation as this. It did not rule that, if a convicted person has never had counsel, the fact that in a later proceeding he conceivable might have had such aid if he had applied for it cures the denial, more particularly when so far as appears he was treated no better during his trial for the second offense than during the first, and when moreover his present attack is made as a preliminary one required by state law for showing the second sentence invalid.

In my judgment it is for the state, not this Court, to say whether the atack upon the first sentence as increasing the second shall be made on the flank or frontally, or perchance in either way. Indeed, under the law of New York, which is controlling on us, the so-called "flank" attack is apparently the only one now open to petitioner. In the face of so clear a violation of constitutional right as this case presents, we should neither foreclose that avenue nor substitute for it another dubiously available one of our own manufacture.

The judgment should be reversed.